83-165

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
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No. _____

IN THE

Supreme Court Of The United States

October Term, 1983

YORK INTERNATIONAL and YORK DIVISION,
BORG-WARNER CORPORATION,
Appellants,

v.

ALABAMA OXYGEN COMPANY, INC.
and THE INDUSTRIAL DEVELOPMENT BOARD
OF THE CITY OF BESSEMER, ALABAMA,
Appellees.

ON APPEAL FROM THE SUPREME COURT
OF ALABAMA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Is this Court's holding in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*[1] that state courts are obligated to follow and apply the Federal Arbitration Act mere "dicta" which a state court is free to ignore if it concludes that the Federal Arbitration Act is repugnant to state law regarding arbitration?

2. Does Congress have the authority under the Commerce Clause to make the Federal Arbitration Act applicable to a state court suit in which the plaintiffs' claim is based on a contract admittedly involving a transaction in interstate commerce?

3. Does the Federal Arbitration Act, as applied to suits in state courts, violate the Tenth Amendment to the United States Constitution?

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[1] 103 S. Ct. 927 (1983).

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PARENT COMPANY, SUBSIDIARIES AND AFFILIATES

York Division is an unincorporated division of Borg-Warner Corporation. Subsidiaries and affiliates of Borg-Warner Corporation as listed with the Securities and Exchange Commission are as follows:

Name of Subsidiary	Place of Organization
Borg-Warner Acceptance Corporation	Delaware
Arcadia Insurance Company	Arizona
Arcadia National Life Insurance Company	Arizona
Borg-Warner Acceptance Canada, Ltd.	Canada
Borg-Warner Credit (Ontario) Limited	Ontario, Canada
Borg-Warner Acceptance Corporation of Arkansas	Arkansas
Borg-Warner Acceptance Corporation (Australia) Ltd.	New South Wales, Australia
Borg-Warner Acceptance Corporation International, Ltd.	Delaware
Borg-Warner Acceptance Limited	England
Borg-Warner Financierings-maatschappij B.V.	Netherlands
Borg-Warner Finanzierung GmbH	Germany
Borg-Warner Insurance Finance Corporation	Delaware
Borg-Warner Insurance Finance Corporation of California	California
Borg-Warner Leasing Corporation	Delaware
Borg-Warner Mortgage Service Corporation	Delaware
BWAC Insurance Agency, Inc.	Illinois
B-W Credit Corporation	Delaware
BWL, Inc.	Delaware
BWL Leasing Corporation	Delaware
Clarendon Industries, Incorporated	Arizona
Creon Life Insurance Company	Illinois

Name of Subsidiary	Place of Organization
S.A. Borg-Warner Acceptance Corporation N.V.	Belgium
Borg-Warner A. G. Zug	Switzerland
Le Froid Industriel York S.A.	France
Borg-Warner B.V.	Netherlands
Borg-Warner Chemicals A/S	Norway
Borg-Warner S.r.l.	Italy
Borg-Warner (Canada) Limited	Canada
Borg-Warner Central Environmental Systems, Inc.	Delaware
Borg-Warner Chemicals, Inc.	Delaware
Borg-Warner Chemicals S.A.R.L.	France
Borg-Warner de Mexico, S.A.	Mexico
Borg-Warner Equities Corporation	Delaware
B-W Marketing Services, Inc.	Delaware
Borg-Warner Equities Corporation of California	California
Borg-Warner Insurance Holding Corporation	Delaware
Borg-Warner Insurance Services, Inc.	Delaware
Centaur Insurance Company	Illinois
Atlantic and Gulf Insurance Agency, Inc.	Florida
Centaur International Insurance Company Ltd.	Bermuda
Borg-Warner International Corporation, Puerto Rico	Delaware
NAL II, LTD.	Delaware
NAL III, LTD.	Delaware
Woodside Ltd.	Colorado
Borg-Warner Export Sales Corporation	Delaware
Borg-Warner France S.A.R.L.	France
Le Froid Industriel York S.A.	France
Borg-Warner GmbH	Germany
Borg-Warner Health Products, Inc.	Delaware
Borg-Warner International Corporation	Delaware
Borg-Warner International, S.A.	Belgium
Borg-Warner Ireland Limited	Ireland
Borg-Warner Investments Corporation	Delaware

Name of Subsidiary	Place of Organization
Baker Industries, Inc.	Delaware
Baker Protective Services, Inc.	Delaware
The Desert Patrol	California
Pony Express Courier Corp.	Delaware
Pony Express Courier Corporation of Texas	Texas
Pony Express Courier Corporation of Virginia	Virginia
Pyro Chem, Inc.	New Jersey
Pyrotronics Canada Limited	Ontario, Canada
Wells Fargo Alarm Services of Canada Ltd.	Canada
Wells Fargo Armored Service Corporation	Delaware
Wells Fargo Armcar, Inc.	Canada
Wells Fargo Armored Service Corp. of D.C.	Washington, D.C.
Wells Fargo Armored Service Corporation of Puerto Rico	Tennessee
Wells Fargo Government Services, Inc.	Delaware
Wells Fargo Guard Service Inc. of Florida	Florida
Wells Fargo Investigative Services, Inc.	Delaware
Borg-Warner Investments Pty. Ltd.	New South Wales, Australia
Borg-Warner (Australia) Limited	New South Wales, Australia
Borg-Warner (Asia/Pacific) Pty. Ltd.	New South Wales, Australia
Borg-Warner Investments (New Zealand) Ltd.	New Zealand
Borg-Warner Sales and Service, Ltd.	New Zealand
Borg-Warner S.A. (Proprietary) Ltd.	South Africa
B.W.A.C. Leasing (Australia) Pty. Limited	Australian Capital Territory, Australia

Name of Subsidiary	Place of Organization
Warneford Industries Pty. Limited	New South Wales, Australia
Weber Carburettors (Aust.) Pty. Ltd.	New South Wales, Australia
Marbon Chemicals Limited	Victoria, Australia
Borg-Warner K.K.	Japan
Borg-Warner Limited	England
Borg-Warner Chemicals U.K. Limited	England
Creon Insurance Agency Limited	England
Toolworks Limited	England
Borg-Warner Overseas Capital Corporation	Delaware
Borg-Warner B.V.	Netherlands
Borg-Warner do Brasil Industria e Comercio Ltda	Brazil
BWB Comercio e Participacao Ltda.	Brazil
Borg-Warner Sweden A.B.	Sweden
Byron Jackson Argentina, I.C.S.A. S.A.	Argentina
Byron Jackson Co. S.A.	Mexico
Creon Insurance Agency, Inc.	Illinois
Ibrahim Abunayyan-Byron Jackson Service Co. Ltd.	Saudi Arabia
New Business Corporation	Delaware
Refrigeracion York, S.A.	Venezuela
York International Corporation	Delaware

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October Term, 1983

YORK INTERNATIONAL and YORK DIVISION, BORG-WARNER CORPORATION,
Appellants,

v.

ALABAMA OXYGEN COMPANY, INC. and THE INDUSTRIAL DEVELOPMENT BOARD OF THE CITY OF BESSEMER, ALABAMA,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF ALABAMA

JURISDICTIONAL STATEMENT

York International and York Division, Borg-Warner Corporation, the appellants, appeal from the final decree of the Supreme Court of Alabama, dated May 13, 1983, holding the Federal Arbitration Act, as applied to suits in state courts, unconstitutional.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama, which appears in the Appendix hereto, pp. A-2 to A-33, *infra,* is reported at 17 Alabama Bar Reports (ABR) 2032.

The order of the Circuit Court of Jefferson County, Alabama, Bessemer Division, dated June 21, 1982, granting a stay pending arbitration pursuant to Section 3 of the Federal Arbitration Act, 9 U.S.C. §§ 1-13, is not reported. It is reprinted in the Appendix hereto, pp. A-34 to A-37, *infra*.

JURISDICTION

The opinion of the Supreme Court of Alabama, ordering the trial court to dissolve the stay pending arbitration was entered on May 13, 1983. On June 3, 1983, the trial court complied with the final decree of the Supreme Court of Alabama and dissolved the stay.[2]

This appeal is taken under 28 U.S.C. §§ 1257 (1) and (2).[3] The only issue before the Alabama Supreme Court was whether the state courts of Alabama were required to follow and apply the Federal Arbitration Act in ruling on a motion to stay a state court suit pending arbitration when the arbitration clause in question was set forth in a contract admittedly evidencing a transaction in interstate commerce. The decision of the Alabama Supreme Court is final on the federal issue presented and is not subject to further review in the courts of Alabama.[4] The writ to the Alabama Supreme Court placed into question the "validity of a . . . statute of the United States" — the Federal Arbitration Act — and the Alabama Supreme Court issued a decision holding that the Federal Arbitration Act as applied to the state courts of Alabama was an impermissible exercise by Congress of its power under the Commerce Clause and was

[2]The parties have agreed to maintain the status quo pending appeal to this Court.

[3]If an appeal is not appropriate, this Jurisdictional Statement should be deemed a Petition for Certiorari. 28 U.S.C. § 2103.

[4]See, *e.g.*, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 475 (1975); *Moses H. Cone Hospital v. Mercury Const. Corp.*, 103 S. Ct. 927 (1983); *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713 (1962).

violative of the Tenth Amendment. 28 U.S.C. § 1257 (1). Further, the Alabama Supreme Court held that an act of the Alabama Legislature denying the enforceability of agreements to arbitrate future disputes[5] and the constitution of the State of Alabama[6] are repugnant to the Federal Arbitration Act and ruled in favor of the validity of the Alabama statute and constitution and against the validity of the Federal Arbitration Act. 28 U.S.C. § 1257 (2). As a result of the decree of the Alabama Supreme Court, appellants have been denied their right to arbitration guaranteed by the Federal Arbitration Act and can only obtain relief from this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Federal Arbitration Act, 9 U.S.C. §§ 1-13, Appendix, pp. A-39 to A-44.
2. U.S. Const. art I, § 8, cl. 3 (Commerce Clause).
3. U.S. Const. art. VI, cl. 2 (Supremacy Clause).
4. U.S. Const. amend. X.
5. Ala. Const. of 1901, art. I, § 13, Appendix p. A-45.
6. Ala. Const. of 1901, art. IV, § 84, Appendix p. A-45.
7. Ala. Code § 8-1-41 (1975), Appendix p. A-45.

STATEMENT OF THE CASE

This litigation arises out of the sale of refrigeration equipment by the York Division of Borg-Warner Corpora-

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[5]Ala. Code § 8-1-41 (1975). Appendix, p. A-45.

[6]Ala. Const. of 1901, Art. I, § 13. Appendix, p. A-45. In so ruling, the Alabama Supreme Court ignored a more specific provision of the Alabama constitution which evidences a state policy to encourage arbitration. Section 84 of the Alabama constitution provides: "It shall be the duty of the legislature to pass such laws as may be necessary and proper to decide differences by arbitrators to be appointed by the parties who may choose that mode of adjustment." Ala. Const. of 1901, Art. IV, § 84.

tion (hereafter "York") to the Industrial Development Board of the City of Bessemer, Alabama (hereafter "Bessemer IDB") pursuant to a written contract between York and Bessemer IDB. York assembled the various pieces of equipment in question at York's manufacturing plant in York, Pennsylvania and then shipped the equipment in interstate commerce to Bessemer, Alabama. Bessemer IDB, in turn, leased the equipment to Alabama Oxygen Company, Inc. (hereafter "Alabama Oxygen"). On November 9, 1981, Bessemer IDB and Alabama Oxygen filed suit against York alleging breach of contract and other wrongs with regard to the equipment sold by York to Bessemer IDB.

The contract executed by York and Bessemer IDB was prepared by the agent for the Bessemer IDB and contains a broad arbitration clause providing that *"any dispute, controversy or claim arising out of or related to this contract shall be settled by arbitration* . . . in accordance with the rules then and there pertaining of the American Arbitration Association" (emphasis added).

In its initial pleading, York moved the trial court for an order staying the proceedings pending arbitration of the dispute between the parties pursuant to Section 3 of the Federal Arbitration Act. York argued that the contract was one "evidencing a transaction involving commerce" and that the Federal Arbitration Act required the trial court to stay the case pending arbitration of the dispute in question. Plaintiffs did not challenge the proposition that the contract at issue evidenced a transaction involving commerce. Plaintiffs opposed York's motion only on the ground that the law of Alabama does not favor contracts to arbitrate future disputes.[7]

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[7]See note 5, *supra*. See also note 6, *supra*.

After receiving briefs and hearing oral argument on the issues involved, the trial court entered an order on June 21, 1982, granting York's motion to stay pending arbitration. The trial court found the Federal Arbitration Act applicable to the contract at issue:

> . . . The contract between the Bessemer IDB and York contains a broad arbitration clause providing for the final resolution of any disputes arising out of the contract between the parties. *The pleadings and the affidavit of a York employee, John S. Mann, establish that the transaction governed by the contract between York and the Bessemer IDB was one involving interstate commerce. Plaintiffs do not challenge this conclusion.* The Court finds, therefore, that the contract between the Bessemer IDB and York evidences "a transaction involving commerce" as that term is defined by Section 1 of the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* The Court further finds that because this suit arises out of a contract involving interstate commerce it is governed by the Federal Arbitration Act and that under the terms of that Act, the Court must stay these proceedings pending arbitration as required by 9 U.S.C. § 3.

Alabama Oxygen Company v. York International, No. 81-530 (Cir. Ct. June 21, 1982) (emphasis added). (A-35). Bessemer IDB and Alabama Oxygen subsequently filed a motion to reconsider which the trial court denied without opinion.

Some three months after the trial court denied the motion to reconsider, Bessemer IDB and Alabama Oxygen filed a petition for writ of mandamus with the Supreme Court of Alabama seeking an order from that court requiring the lower court to dissolve its stay. After receiving briefs from all parties, the Alabama Supreme Court issued an opinion on May 13, 1983, granting the petition for a writ of mandamus and requiring the trial court to dissolve

its stay. The trial court dissolved the stay on June 3, 1983, in compliance with the decree of the Alabama Supreme Court.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The Supreme Court of Alabama has directly challenged the authority of Congress by holding the Federal Arbitration Act — a statute in force for more than 50 years — to be unconstitutional as applied to suits in the state courts of Alabama. In so ruling, the Alabama court subverted a recent decision of this Court. In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 103 S. Ct. 927 (1983), this Court found Section 2 of the Federal Arbitration Act to be "a congressional declaration of a liberal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Id.* at 941. On the question of the applicability of the Federal Arbitration Act to suits in state courts, the Court held in the most unambiguous terms that "Federal law in terms of the Arbitration Act governs that issue [arbitrarily] in either state or federal court" and that "state courts, as much as federal courts, are obligated to grant stays under § 3 of the Arbitration Act." *Id.* at 941-42.

Despite the seemingly clear holding of the *Moses Cone* decision, the high court of Alabama found the Federal Arbitration Act inapplicable to suits brought in the courts of the State of Alabama. That "finding" violates our system of federalism, creates uncertainty with respect to the scope of the Federal Arbitration Act and places in question the vitality of arbitration as an alternative to court litigation. The Alabama Supreme Court's decision raises substantial questions of federal law requiring plenary consideration by this Court.

I. This Court's holding in *Moses Cone* that the Federal Arbitration Act applies to suits in state as well as federal courts was not mere "dicta".

The Alabama Supreme Court first said that this Court's holding in *Moses Cone* is not binding on the Alabama courts (and other state courts) because "the Supreme Court, upon full consideration of the issues, would not so hold." 17 ABR at 2036 (A-5). To state that argument is to dispose of it. This Court in *Moses Cone* could not have been any clearer in addressing the issue then pending before the Alabama court — "state courts . . . . are obligated to grant stays under § 3 of the Arbitration Act." 103 S. Ct. at 942. The only basis offered by the Alabama court for its failure to follow that holding is the bald assumption that this Court had not adequately considered the "issues" when it so ruled in *Moses Cone* and the fantastic prediction that if this Court were to give "full consideration" to "the issues" involved it would reverse its holding in *Moses Cone*. Such an unprincipled action by the Alabama Supreme Court should not be allowed to stand. Otherwise, companies and individuals located in Alabama will be denied the protection afforded by the Federal Arbitration Act, and the courts of other states might be encouraged to thwart the will of Congress as interpreted by this Court and every other state supreme court that has addressed the issue to date.

II. The Federal Arbitration Act is a legitimate exercise of Congress's power to regulate commerce.

Next, in declaring the Federal Arbitration Act as applied to state courts an unconstitutional exercise of Congressional power under the Commerce Clause, the Supreme Court of Alabama states: "We have found no studies regarding the effects upon interstate commerce of various state provisions regarding arbitration." 17 ABR at 2039 (A-8). That court

then concludes: "We do not think variance in state policies regarding arbitration has more than a trivial impact on interstate commerce." *Id.* On this basis alone, the Alabama Supreme Court purports to invalidate the Federal Arbitration Act as applied to the state courts of Alabama (and presumably all other states) as an unconstitutional exercise of Congressional power.[8]

That position is clearly wrong and is contrary to existing cases dealing with the Federal Arbitration Act. This Court has, in fact, expressly held that the "admiralty and commerce powers" of Congress formed "the principal bases" of the Federal Arbitration Act. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405 at n. 13 (1967). The Court concluded in that decision: "[I]t is clear beyond dispute that the federal arbitration statute is based upon and confined to the *incontestable* federal foundations of 'control over interstate commerce and over admiralty.'" *Id.* at 405 (emphasis added). The highest courts of several states have reached the same conclusion.[9]

III. Application of the Federal Act to suits in state courts does not violate the Tenth Amendment.

Finally, the Supreme Court of Alabama attempts to bring the Federal Arbitration Act within the area where federal activity is forbidden by the Tenth Amendment to the United States Constitution. In doing so, the Alabama court

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[8]It is worth noting that in each of the decisions cited by the Supreme Court of Alabama, the United States Supreme Court actually *sustained* the validity of the challenged federal statute as a proper exercise of Congress's power under the Commerce Clause.

[9]*E.g., Episcopal Housing Corp. v. Federal Insurance Company*, 239 S.E. 2d 647, 649 (S.C. 1977) ("The Federal Arbitration Act was enacted pursuant to the commerce clause, thereby superseding the South Carolina common law").

relies primarily on the decisions of this Court in *National League of Cities v. Usery*, 426 U.S. 833 (1976) and *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*, 452 U.S. 264 (1981). A review of these and other decisions addressing the scope of the Tenth Amendment, including this Court's recent decision in *EEOC v. Wyoming*, 103 S. Ct. 1054 (1983), reveals the error of the Alabama court.

This Court has never applied the Tenth Amendment in the manner suggested by the decision of the Alabama court. The application of the Federal Arbitration Act in this case simply does not infringe any state's rights protected by the Tenth Amendment. Here, the Federal Arbitration Act constitutes an exercise of Congress's power under the Commerce Clause to regulate the agreed method of dispute resolution between several corporate entities,[10] none of which is the State of Alabama.

This Court recently addressed the very argument now advanced by the Supreme Court of Alabama. In *EEOC vs. Wyoming, supra*, the Court reviewed "the hurdles" confronting "any claim that a state or local governmental unit should be immune from an otherwise legitimate exercise of the federal power to regulate commerce". *Id.* at 1060. Although the Court found the threshold requirement — "that the challenged federal statute regulates the 'States as States' " — had been met in that case, it added:

> It is worth emphasizing, however, that it is precisely this prong of the *National League of Cities* test that

[10]The IDB of Bessemer is a public corporation created pursuant to Alabama law. Ala. Code §§ 11-54-80 to -101 (1975). It has the power to enter into contracts and to sue or be sued. Ala. Code § 11-54-87 (1975). The co-appellee Alabama Oxygen is a private corporation organized under the laws of Delaware. The Alabama Supreme Court made no distinction based on IDB of Bessemer being a public corporation. Its decision is a clear holding that in the Alabama courts the Federal Arbitration Act has *no* field of application whether the parties be public, private or otherwise.

> marks it as a specialized immunity doctrine rather than a broad limitation on federal authority. As we made clear in *Hodel*, "A wealth of precedent attests to congressional authority to displace or pre-empt state laws regulating *private* activity affecting interstate commerce when these laws conflict with federal law. . . . Although such congressional enactments obviously curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider important, the Supremacy Clause permits no other result."

Id. at 1061, n. 10. Similarly, in the Federal Arbitration Act, Congress undertook to regulate private activity as a legitimate exercise of its power under the Commerce Clause. The Tenth Amendment simply does not come into play under such circumstances.[11]

In effect, the Alabama Supreme Court asserts that if a state has passed a statute or has a major standing case law principle, the Tenth Amendment applies because as a result of such statute or case law rule the state acts as a state. So interpreted the Commerce Clause is subservient to the Tenth Amendment and the Supremacy Clause is totally

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[11]Even if appellees could satisfy the first requirement for a successful Tenth Amendment challenge -- that the challenged legislation regulates the states as states -- it is obvious that they cannot meet the remaining hurdles. This Court summarized those hurdles in *Hodel*: "Second, the federal regulation must address matters that are indisputably 'attributes of state sovereignty.' And third, it must be apparent that the states' compliance with the federal law would directly impair their ability to "structure integral operations in areas of traditional governmental functions.' " *Hodel*, 452 U.S. 264, 287-288. Finally, even if the party challenging the federal action satisfies these three requirements, the interests involved must be balanced. As the Court continued in *Hodel*: "Demonstrating that these three requirements are met does not guarantee that a Tenth Amendment challenge to congressional commerce power action will succeed. There are situations in which the nature of the federal interest advanced may be such that it justifies state submission." *Id.* at 288, n.29. No basis exists for concluding that the high standards set by this Court have been met in the instant case.

avoided. The Alabama court's reasoning is faulty and its interpretation of the United States Constitution and the decisions of this Court is clearly wrong.

CONCLUSION

The Alabama Supreme Court has challenged the constitutionality of an act of Congress enacted over 50 years ago and a decision of this Court issued less than 6 months ago, not inadvertently, but intentionally. This direct challenge to the authority of Congress and this Court poses a serious problem for our federal system and requires the intervention of this Court. Moreover, if allowed to stand, the Alabama court's decision would make arbitration a less certain alternative to court litigation at a time when many legal experts are encouraging contracting parties to agree to arbitration as a less costly and speedier means to resolve disputes and one that can also reduce court case loads. This Court should summarily reverse the decision of the Alabama Supreme Court and reaffirm its holdings in *Moses Cone*.

Respectfully submitted,

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APPENDIX

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THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
OCTOBER TERM, 1982-83

Ex parte: Alabama Oxygen Company, Inc.,
and the Industrial Development Board
of the City of Bessemer

PETITION FOR WRIT OF MANDAMUS

(In re: Alabama Oxygen Company, Inc.,
and the Industrial Development Board
of the City of Bessemer, Alabama

82-106 v.

York International, York Division,
Borg-Warner Corporation, et al.)

PER CURIAM.

I.

This court must determine whether the writ of mandamus should issue and the trial court be directed to vacate its stay entered in the civil action below.

Petitioners are the Industrial Development Board of the City of Bessemer, Alabama, herein the "Development Board," and Alabama Oxygen Company, Inc., herein "Alabama Oxygen." Respondent is York International, herein "York."

II.

The Development Board agreed with Lotepro Corporation, a non-party (herein "Lotepro") for the construction of an air separation facility in Bessemer, Alabama. It was to be built on property owned by the Board. The completed facility was to be leased to Alabama Oxygen. Lotepro served as general contractor for the construction project and also served as purchasing agent for the Board.

One component incorporated by Lotepro into the air separation facility was a refrigeration package obtained from York. The subcontract for this component was negotiated and executed by Lotepro and York. It involved an oral agreement followed by a written confirmation. There is conflicting evidence whether arbitration was discussed, but the written confirmation of Lotepro's oral purchase order contained a clause calling for arbitration. It read as follows:

> "Any dispute, controversy or claim arising out of or related to this contract shall be settled by arbitration held in New York City in accordance with the rules then and there pertaining to the American Arbitration Association, and judgment upon any award rendered in such proceeding may be entered in any court having jurisdiction as provided by law."

The contract further provided that it should be "construed and governed by and according to the laws of the State of New York." Both the Board and Alabama Oxygen contend they were unaware of the terms of the subcontract.

The refrigeration package was brought from York, Pennsylvania (through Maryland, Virginia, Tennessee and Georgia) to Bessemer, Alabama, where it was assembled, tested, and placed into operation by representatives of Lotepro and York. It was then tendered to petitioners for acceptance.

On several occasions failure of the equipment caused shutdowns to the entire separation facility. The refrigeration package was ultimately removed and replaced.

On 9 November 1981, York filed a motion to stay pending arbitration. The parties submitted briefs on the issues presented by York's motion. On 21 June 1982, the trial court entered an order granting York's motion and staying proceedings pending arbitration. The trial court's findings were that:

> (1) The Federal Arbitration Act (herein the "F.A.A. or the "Act") applies to any contract which arises from a transaction involving interstate commerce. The transaction in question arose from such a transaction.

(2) Lotepro was the agent of the Development Board. Under Alabama law of agency, the Board is bound by the contract executed between Lotepro and York.

(3) Alabama Oxygen has brought suit as a third party beneficiary of the contract executed between Lotepro and York. Under Alabama contract law, Alabama Oxygen is bound by the arbitration agreement in that contract.

(4) Even if state law rather than federal law governs the issues raised by York's motion, then the law of the State of New York – not Alabama – applies. Under the law of New York, agreements to arbitrate such as the one entered into by the Lotepro and York are clearly enforceable.

The Development Board and Alabama Oxygen filed a motion for reconsideration, which was overruled. This petition for the writ of mandamus followed.

III.

Petitioners seek the writ ordering the trial court to vacate its stay and allow prosecution of their civil action against York. The dispositive issue presented for decision by this court is whether the trial court erred in choosing to apply federal rather than state law and; in the alternative, New York rather than Alabama law.

Alabama Oxygen and the Development Board contend Alabama law controls the issues presented by this case. We agree.

IV.

The United States Supreme Court has not directly confronted the issue whether the F.A.A. is to be applied in state courts. Many states have so held.[1] See *Moses H. Cone Hospital*

[1]See *McEntire v. Monarch Feed Mills*, 631 S.W. 2d 307 (Ark. 1982); *Keating v. Superior Court of Alameda County*, 645 P. 2d 1192 (Cal. 1982); *Heela Min. Co. v. Bunker Hill Co.*, 617 P. 2d 861 (Idaho 1981); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Melame*, 405 So. 2d 790 (Fla. Dist. Ct. 1981); *Payne Webber v. McNeal*, 239 S.E. 2d 401 (Ga. App. 1977); *Pathman Constr. Co. v. Knox County Hospital Ass'n*, 326 N.E. 2d 844 (Ind. App. 1975); *R. J. Palmer Constr. Co. v. Wichita Band Inst. Co.*, 642 P. 2d 127 (Kan. App. 1982); *Fite & Warmath Constr. Co. v. M.Y.S.*

v. Mercury Constr. Corp., [Ms. 81-1203, February 23, 1983] ____ U.S. ____ (1983). That court has, however, stated in dicta that "state courts, as well as federal courts are obligated to grant stays under § 3 of the Arbitration Act." *Id.*, at 23.

A review of the Act and its legislative history leads us to the conclusion that we would be remiss in interpreting it as applicable in Alabama. We believe the Supreme Court, upon full consideration of the issues, would not so hold. Further, we are of the opinion the Act, if construed as applicable to the states, presents serious constitutional questions.

A.

Our first inquiry is whether Congress, pursuant to its power to regulate commerce, U.S. Const., Art. 1, § 8, has prohibited state regulation of the aspect of commerce involved here. Where, as here, the field which Congress is said to have pre-empted has been traditionally occupied by the States, see, e.g., U. S. Const., Art. 1, § 10; *Patapsco Guano Co. v. North Carolina*, 171 U. S. 345, 358, (1898), the assumption is that the historic police powers of the States are "not to be superseded by the Federal Act unless that was the clear and manifest pur-

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Corp., 559 S.W. 2d 729 (Ky. 1977); *Thayer v. American Finan. Advisors, Inc.*, 322 N.W. 2d 599 (Minn. 1982); *State ex rel. St. Joseph Light and Power Co. v. Donelson*, 631 S.W. 2d 887 (Mo. App. 1982); *Sentry Systems, Inc. v. Guy*, 654 P. 2d 1008 (Nev. 1982); *J. Ludwig Mowinkels Rederi v. Dow Chemical Co.*, 255 N.E. 2d 774 (N.Y. 1970), *cert. den.* 90 S. Ct. 1844 (1971); *Burke County Pub. Schools Bd. of Ed. v. Shover Partnership*, 279 S.E. 2d 816 (N.C. 1981); *Litton R.C.S., Inc. v. Penn Turnpike Comm.*, 376 F. Supp. 579 (D.C. Pa. 1974); *Episcopal Housing Corp. v. Fed. Ins. Co.*, 239 S.E. 2d 647 (S.C. 1977); *Tenn. River Pulp and Paper Co. v. Eichleay Corp.*, 637 S.W. 2d 853 (Tenn. 1982); *Withers-Busby Group v. Surety Industries*, 538 S.W. 2d 853 (Tenn. 1982); *R. E. Bean Constr. Co. v. Middlebury Associates*, 428 A. 2d 306 (Vt. 1980); and *Pinkis v. Network Cinema Corp.*, 512 P. 2d 751 (Wash. App. 1973). Other states have held the Federal Act inapplicable; see *Pullman, Inc. v. Phoenix Steel Corp.*, 304 A. 2d 334 (Del. Sup. Ct. 1973); *Kress Corp. v. Edw. C. Levy Co.*, 430 N.E. 2d 593 (Ill App. 1981); *Standard Co. of New Orleans, Inc. v. Elliott Constr. Co.*, 363 So. 2d 671 (La 1978); and *Wilson and Co. v. Fremont Cake and Meal Co.*, 43 N.W. 2d 657 (Neb. 1950), *cert. denied*, 342 U.S. 812 (1951).

pose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). This assumption provides assurance that "the federal-state balance," *United States v. Bass*, 404 U.S. 336, 349 (1971), will not be disturbed unintentionally by Congress or unnecessarily by the courts. Only when Congress has "unmistakably . . . ordained," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963), that its enactments alone are to regulate a part of commerce, must state laws regulating that aspect of commerce fall. Congress's command may be either expressly stated in the statute's language, or implicitly communicated in its structure and purpose. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973).

Congress passed the F.A.A. in 1925 pursuant to its power to regulate procedure in the federal courts and control interstate commerce. H.R. Rep. No. 96, 68th Cong. 1st Sess. 1 (1924). Its purpose was to enforce arbitration agreements in federal courts.

Notably, the Act was debated prior to the Supreme Court's decision in *Erie R. R. v. Tompkins*, 304 U.S. 64 (1938). At that time the federal courts had interpreted *Swift v. Tyson*, 41 U.S. 1 (1842), to mean they could adopt a federal common law in diversity cases that differed from the state common law of the forum. The wording of the Act and its legislative history indicate a desire by Congress to create a law only applicable in federal courts in diversity cases.

The body of the F.A.A. makes evident the intent of the framers that the Act not preempt state law regarding arbitration. Section 3 of the Act provides for the stay of proceedings pending arbitration brought in "any of the courts of the *United States*", 9 U.S.C. § 3, upon any issue referable to arbitration under an agreement in writing for such arbitration. Section 4 provides for an order compelling arbitration *only* when the *federal district court* would have jurisdiction over a suit on the underlying dispute. 9 U.S.C. § 4.

Had the framers of the Act intended that it be applicable in state courts surely they would have given those courts the

power to compel arbitration. In a case where "the party opposing arbitration is the one from whom payment or performance is sought, a stay or litigation alone is not enough. It leaves the recalcitrant party free to sit and do nothing — neither to litigate nor to arbitrate." *Moses H. Cone Hospital v. Mercury Constr. Corp., supra.* We envision a situation where, while the contract is one which arises from an interstate transaction, there is no diversity jurisdiction. Where, as in Alabama, the arbitration of future disputes is against public policy, so that no state statute provides a court with the power to compel arbitration, and the parties cannot obtain a § 4 order from a federal court because of lack of diversity jurisdiction, the party who wishes to compel arbitration would have no way to do so.

Furthermore, there is no clause within the Act specifically preempting state law. While it is not necessary that Congress specify when an act preempts state law, it has been done, as in 17 U.S.C. § 301, entitled *"Preemption with Respect to Other Laws."* In any event, the Congress did not specify preemption in the Federal Arbitration Act.

Neither does the *legislative history* of the Act indicate intent to do so. Testimony at the Joint Hearings on the bill indicates Congress intended to create a law applicable only in federal courts:

> "Nor can it be said that the Congress of the United States, directing its own courts . . ., would infringe upon the provinces or prerogatives of the States. The question of the enforcement relates to the law or remedies and not to substantive law. The rule must be changed for the jurisdiction in which the agreement is sought to be enforced. . . . There is no disposition therefore by means of the Federal bludgeon to force an individual State into an unwilling submission to arbitration enforcement." Joint Hearings on S. 1005 and H. R. 646 before the Subcommittees of the Committees on the Judiciary, 68th Cong., 1st Sess., 739-40 (1923). (Statement of Mr. Julius Henry Cohen, draftsman for the American Bar Association of the proposed bill.)

See *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.,*

388 U.S. 395, 408-11 (1967) (Black, J., dissenting), where Justice Black discusses the legislative history of the F.A.A.

We cannot, in light of the substance of the Act and its legislative history, conclude that Congress has, either explicitly or implicitly, ordained that the Federal Act preempt state law.

Had the F.A.A. ordained that state law was to be preempted by that Act, we would be compelled to consider its constitutionality in light of the Commerce Clause and the Tenth Amendment. It has long been established that the commerce power does not reach activity which merely "affects" interstate commerce. There must instead be a showing that the regulated activity has a *substantial effect* on that commerce. See *NLRB v. Jones & Laughlin Steel Corporation*, 301 U.S. 1, 37 (1937); *Shreveport Rate Case*, 234 U.S. 342, 351 (1914); *Wikard v. Filburn*, 317 U.S. 111, 125 (1942); *North American Co. v. SEC*, 327 U.S. 686, 705 (1946). In *Maryland v. Wirtz*, 392 U.S. 183, 197, n. 27 (1968), overruled on other grounds, 426 U.S. 833, 852-855 (1976), the Supreme Court stated it had not declared Congress may use a "relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities."

We have found no studies regarding the effects upon interstate commerce of various state provisions regarding arbitration. Most of the states enforce agreements to arbitrate future disputes. Alabama encourages arbitration by statutorily providing that an arbitrator's decision has the same effect as a state court jury verdict, § 6-6-12, Code 1975, but does not allow specific enforcement of agreements to arbitrate future disputes. § 8-1-41, Code 1975. We do not think variance in state policies regarding arbitration has more than a trivial impact on interstate commerce.

C.

Even if Congress had the power to regulate under the Commerce Clause, such regulation would, under the circumstances here presented, constitute a violation of state rights pursuant to the Tenth Amendment.

It is well settled that Congress's authority under the Commerce Clause is restricted by the protections afforded the states by the Tenth Amendment. See, e.g., *National League of Cities v. Usery*, 426 U.S. 833 (1976); *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*, 452 U.S. 264 (1981); *United Transportation Union v. Long Island R. R.* 455 U.S. 678 (1982). In *National League of Cities v. Usery*, the Supreme Court struck down an attempt by Congress to extend the wage and hour provisions of the Fair Labor Standards Act to state and local governments. The Tenth Amendment was there defined as an "affirmative limitation on the exercise of [congressional power under the Commerce Clause] akin to other commerce power affirmative limitations contained in the Constitution." 426 U.S. at 841.

The Supreme Court established a standard for determining whether a Congressional regulation is violative of the Tenth Amendment in *Hodel v. Virginia Surface Mining & Reclamation Ass'n., Inc.*:

> "[I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of National League of Cities must satisfy *each* of three requirements. First, there must be a showing that the challenged statute regulates the 'States as States.' Second, the federal regulation must address matters that are indisputably 'attributes of state sovereignty.' And third, it must be apparent that the States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional governmental functions.' "

452 U.S. at 287-288 (citations omitted; emphasis in original). Moreover,

> "Demonstrating that these three requirements are met does not . . . guarantee that a Tenth Amendment challenge to congressional commerce power action will succeed. There are situations in which the nature of the federal interest advanced may be such that it justifies state submission."

Id., at 288, n. 29 (citations omitted).

The F.A.A., if interpreted as applicable in Alabama, would undoubtedly regulate Alabama as a State. In *Hodel*, the Supreme Court, in determining whether a federal act regulated "States as States," considered whether the States were compelled to enforce the standards provided by the Act, to expend any state funds, or to participate in the federal regulatory program in any manner whatsoever. *Id.* at 276.

If required to enforce the F.A.A., because the Act provides no federal question jurisdiction, Alabama would be compelled to enforce the Act in state courts. In so doing, we would be required to violate longstanding state public policy. Our policy regarding agreements to arbitrate future disputes was recently expressed in *Wells v. Mobile County Board of Realtors*, 387 So. 2d 140, 144 (Ala. 1980):

> "As long ago as 1840, *Bozeman v. Gilbert*, 1 Ala. 90 (1840), the court noted that an individual has a right to have his rights determined in a court of law. The court stated:
>
> > "'A *mere agreement* to decide a controversy by arbitration cannot be enforced at law, or in equity, because no one can effectually waive his right to have his suits determined at the proper Courts provided, by the laws of his country.' (Emphasis added.) I Ala. at 91.
>
> "The public policy of this state is to encourage arbitration and amicable settlements of differences between parties. As the Court stated in *Headley, v. Aetna Ins. Co.*, 202 Ala. 385, 80 So. 466 (1918):
>
> > "'A covenant in a contract, whether of insurance or of other matters, to submit every matter of dispute between the parties, growing out of such contract, to arbitration or to a board of appraisers, to the end of defeating the jurisdiction of courts as to be subject-matter, are [sic] universally held to be void, as against public policy. *There need be no such express intent to so defeat the jurisdiction; if the necessary effect of the covenant will inevitably so operate, it is held to be void because against public policy.* • • • The policy of this state favors arbitration and amicable

> settlements of differences between parties; but it does not favor or allow agreements in advance to oust or defeat the jurisdiction of all courts, as to all differences between parties. Const., § 84; §§ 2908-2923.
>
> "'A general provision in a contract for the arbitration of any dispute which may arise thereunder does not oust the courts, nor bar a suit either at law or equity. *Stone v. Dennis*, 3 Port. 231; *Kinney v. Baltimore & Ohio Employes' Ass'n*, 35 W. Va. 385, 14 S.E. 8, 15 L.R.A. 142.' (Emphasis added.)'"

Furthermore, our courts would, if forced to apply the F.A.A., be compelled to violate a provision of Alabama Constitution and an act of our Legislature constitution provides:

> "That all courts shall be open; and that every person, for any injury done him, in his lands, goods, person, or reputation shall have a remedy by due process of law; . . . ."

Section 13, Const. of Ala. of 1901.

Our Legislature has provided:

> "The following obligations cannot be specifically enforced:
>
> ". . . .
>
> "(3) An agreement to submit a controversy arbitration."

§ 8-1-41, Code 1975.

We can envision no more compelling a situation where a State is regulated as a State than where it is compelled to violate the State's Constitution, to act contrary to the wishes of the citizens as expressed through its Legislature and to reverse its Legislature's enactment.

The second requirement is that the federal statute address an "undoubted attribute of state sovereignty." A contract to arbitrate a dispute is within the realm of contract law. Contract reparations have always been considered matters within the constitutional framework of state courts. Most of the law regarding the enforcement of contracts has been developed by the common law. Regulation of this aspect of contract forma-

tion by Congress thwarts the development of the common law of contracts by the various states.

That the specific area of contract law regulated by the F.A.A. is one which is an "undoubted attribute of state sovereignty" is evidenced by the fact that every state in the union has enacted legislation regarding the enforceability of agreements to arbitrate.[2]

The third prong of the *National League of Cities* test is the requirement that the federal intrusion must impair the ability of the state to structure integral operations. Were Alabama to be required to enforce the F.A.A., it would necessitate alteration of a body of case law which has developed from over a hundred years of judicial thought and experience, and develop-

[2]See Ala. Code § 6-6-12, et seq. (1975); Alaska Stat. §§ 09.43.010, et seq. (1973); Ariz. Rev. Stat. Ann. §§ 12-1501, et seq. (1982); Ark. Stat. Ann. §§ 34-511, et seq. (1962); Cal. Civ. Proc. Code §§ 1280, et seq. (West 1982); Colo. Rev. Stat. §§ 52-408, et seq. (1960); Conn. Gen. Stat. §§ 52-408, et seq. (1960); 10 Del. Code Ann. §§ 35701, et seq. (1974); D. C. Code Ann. §§ 16-4301, et seq. (1981); Fla. Stat. §§ 682.02, et seq. (1980); Ga. Code §§ 7-104, et seq. (1981); Haw. Rev. Stat. §§ 658-1, et seq. (1976); Idaho Code §§ 7-901, et seq. (1979); Ill. Rev. Stat. ch. 10 §§ 101, et seq. (1975); Ind. Code §§ 34-4-2-1, et seq. (1973); Iowa Code §§ 679.1, et seq. (1950); Kan. Stat. Ann. § 5-401, et seq. (1982); Ky. Rev. Stat. Ann. §§ 417, et seq. (1981); La. Rev. Stat. Ann. §§ 9:420, et seq. (1951); 14 Maine Rev. Stat. Ann. §§ 5927, et seq. (1964); Md. Cts. & Jud. Proc. 3-201, et seq. (1974); Mass. Gen. Laws Ann. ch. 251 §§ 1, et seq. (1980); Mich. Stat. Ann. §§ 600.5001, et seq. (1968); Minn. Stat. §§ 572.08, et seq. (1947); Miss. Code Ann. §§ 11-15-1, et seq. (1972); Mo. Ann. Stat. §§ 435.350, et seq. (Vernon, 1982); Mont. Code Ann. §§ 27-5-101, et seq. (1981); Neb. Rev. Stat. §§ 38.015, et seq. (1943); N.H. Rev. Stat. Ann. §§ 541:1, et seq. (1974); Nev. Rev. Stat. §§ 38.015, et seq. (1969); N.J. Rev. Stat. §§ 2A:24-1, et seq. (1952); N.M. Stat. Ann. §§ 44-7-1, et seq. (1978); N.Y. Civ. Prac. Law §§ 7501, et seq. (McKinney 1980); N.C. Gen. Stat. §§ 1-567.1 et seq. (1969); N.D. Cent. Code §§ 32-29-01, et seq. (1976); Ohio Rev. Code Ann. §§ 2711.01, et seq. (1982); Okla. Stat. Ann. §§ 801, et seq. (1960); Or. Rev. Stat. §§ 33-210, et seq. (1981); 231 Pa. Code §§ 1301, et seq. (1981); S. C. Code Ann. §§ 15-48-10, et seq. (1976); S. D. Codified Laws Ann. §§ 21-25-A-1, et seq. (1979); Tenn. Code Ann. §§ 29-5-101, et seq. (1980); Tex. Code Ann. 224, et seq. (Vernon 1973); Utah Code Ann. §§ 78-31-1, et seq. (1953); Va. Code §§ 801-577, et seq. (1977); Wash. Rev. Code §§ 704.010, et seq. (1981); W. Va. Code §§ 55-10-1, et seq. (1981); Wis. Stat. Ann. §§ 788.01, et seq. (1981); Wyo. Stat. §§ 1-36-101, et seq. (1977).

ment of a *new* body of case law. The application of the Federal Act in Alabama would disrupt commercial relationships. There would be unsettled areas of law controlling the enforcement of an arbitration agreement under the Act. These unsettled areas would be a source of uncertainty for parties wishing to make an arbitration contract.

Since we are satisfied that the F.A.A. runs afoul of all three prongs of the *National League of Cities* test, we turn to the balancing test; whether "the federal interest advanced [is] such that it justifies state submission." *Hodel,* at 288, no. 29, citing *Fry v. United States,* 421 U.S. 542 (1975). We opine that in this case, the federal interests in imposing the F.A.A. on states is weak, while both state and federal interests in applying independent state law is strong.

Many courts, to be sure, have discerned "a strong federal policy" in favor of commercial arbitration over litigation in *federal courts.* In *Moses H. Cone Hospital v. Mercury Constr. Corp., supra,* the Supreme Court stated:

> "Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act. In *Prima Paint Corp. v. Flood & Conklin Mfg. Corp.,* 388 U.S. 395 (1967), for example, the parties had signed a contract containing an arbitration clause, but one party alleged that there had been fraud in the inducement of the entire contract (although the alleged fraud did not go to the arbitration clause in particular). The issue before us was whether the issue of fraud in the inducement was itself an arbitrable controversy. We held that the language and policies of the Act required the conclusion that the fraud issue was arbitrable, Id., at 402-404. Although our holding in *Prima Paint* extended only to the specific issue presented, the *courts of appeals* have since consistently concluded that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. We agree. The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the

> scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." (Emphasis added.)

We would make two points. First, there seems to have been no consideration whether there is a strong federal interest in favor of commercial arbitration over litigation in state courts. (It must be noted that in *Moses H. Cone* the source-of-law factor had very little significance.) Secondly, we conclude that both the state and federal interest in preserving state contract law in this area outweighs federal interest in favor of arbitration.

The cases relied on in support of the theory that there is a federal interest in arbitration reveal no such policy in favor of arbitration in state courts. The court in *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F. 2d 402, 410 (2nd Cir. 1959), *cert. dismissed*, 364 U.S. 801 (1960), first announced the federal policy favoring arbitration. This policy, the court said, arises "to help ease the current congestion of court calendars."[3] It

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[3]"The court cited two commercial arbitration cases, neither of which supports the proposition that a federal policy favors arbitration over litigation to ease the congestion of the courts. The citation to *Shanferoke Coal & Supply Corp. v. Westchester Serv. Corp.*, 293 U.S. 449, 453 (1935), was apparently to the Court's reference to 'congressional approval of arbitration.' It is difficult to see how the *Robert Lawrence* court stretched this to support the proposition that Congress favors arbitration independently of the intent of the parties. The citation to *Kulukundis Shipping Co., S/A v. Amtorg Trading Corp.*, 126 F. 2d 978 (2d Cir. 1942), was apparently to that court's quotation from the report of the House Committee that referred to the 'agitation against the costliness and delays of litigation.' H.R. REP. No. 96, 68th Cong. 1st Sess. (1924), *cited in* 126 F. 2d at 985. However, this 'agitation' came from businessmen whose expectations about arbitration agreements were being undermined by the courts. Congress never mentioned any need to reduce the case loads of the federal courts. Courts following *Robert Lawrence* have cited *Robert Lawrence* itself as the source of this policy. *See, e. g., Southwest Indus. Import & Export, Inc. v. Wilmod Co.*, 524 F. 2d 468, 470 (5th Cir. 1975). For an argument that there is a pro-arbitration policy, see Note, *supra* note 17, at 603-04 n. 68." Note, *Federal Arbitration Act*, 78 Mich. L. Rev. 1391 (1980).

does not follow that where there is a federal policy in favor of easing the congestion of court calendars in federal courts, that such a policy would extend to state courts.

We believe it is in the federal interest for state rather than federal law to control the enforcement of arbitration agreements in state courts. The laws of contracts, torts, and property have always been considered matters within the constitutional framework of state courts. These areas of the law have, in the main, been developed through the common law.

While there has been a national surge toward uniformity in the law, pluralism, rather than uniformity, is the genius of the developing common law among our states. Pluralism in the law has permitted each state to find the best solutions to its own problems. Pluralism is the means by which each state may profit from the experience and activities of all the rest. It is in the best interest of both federal and state government to avoid forcing states into a national mold that takes no account of local needs and conditions. We think that is the antithesis of what the authors of our Constitution contemplated for our federal system.

For instance, oil and gas law has been carefully developed and is generally well settled in all of the oil and gas producing states. Theories of mineral ownership, however, vary from state to state. Implied covenants in oil and gas leases, correlative rights of owners, and the nature of ownership of both fugacious and hard minerals varies among these mineral producing states. In the name of uniformity and under its commerce powers, a Congress could invade this state function; but would it be in the national interest?

Congress could regulate regarding tort reparations. It could, in the name of uniformity, wipe out the law of negligence, products liability, state procedures, rules of evidence, presumptions, and defenses which in the various states have developed case by case after much thought. Would it be in our best interests for Congress to provide uniform, but inflexible, tort legislation? We think that sort of uniformity would lead to mediocrity in the law.

Furthermore, if Congress preempts the states in the areas of contracts, torts, and property, what is left for the states? The imposition of uniform acts in these areas is an intrusion upon the integrity of state judiciaries and upon the states themselves. This sort of preemption is exactly what the Tenth Amendment to the Constitution was intended to prevent.

V.

The trial court held that even if state law governed the issues raised by York's motion for a stay pending arbitration, then the law of the State of New York, rather than Alabama, would apply. That court stated:

> "The contract between the Bessemer IDB and York provides in the most unambiguous terms that the contract between these parties 'shall be construed and governed by and according to the laws of the State of New York.' Clauses such as this stipulating that the laws of another state will govern in the case of any dispute under the contract are enforceable in Alabama." *Blalock v. Perfect Subscription Company*, 458 F. Supp. 123 (S.D. Ala. 1978); aff'd, 599 F. 2d 743 (1979).

The trial court was apparently misled as to the federal district court's holding in *Blalock*. The latter court did state: "Under Alabama law, it is entirely proper for parties to stipulate that their contract will be governed by the laws of such a foreign state. See *Craig v. Bemis Company, Inc.*, 517 F. 2d 677, 680 (5th Cir. 1975)." In *Craig*, the Fifth Circuit Court of Appeals held that under Alabama law, where a contract made and performed in Alabama provided that the terms of the contract should be governed by the law of Minnesota and there was no conflict between that law and Alabama law or public policy, the law of Minnesota should apply. It stated:

> "Alabama recognizes the right of the contracting parties to choose the law of another state to govern their contractual rights and duties, so long as the consequences of a provision are not likely to be contrary to Alabama law or public policy. *Connell v. United States Steel Corp.*, 516 F. 2d 401, 407 (5th Cir. 1975); *Matthews v. Swift & Co.*,

465 F. 2d 814, 818 (5th Cir. 1972); *J. R. Watkins Co. v. Hill,* 214 Ala. 507, 508, 108 So. 244, 245 (1926)."

517 F. 2d at 680.

New York law should not have been applied when that law conflicts with the public policy of Alabama. The clause in the contract regarding applicability of New York law cannot override the public policy considerations of the law of Alabama. Petitioners cite *Southern Express Co. v. Gibbs,* 155 Ala. 303, 46 So. 465 (1908) as illustrative of this. That case arose from an alleged breach of contract to deliver goods to Alabama. The contract called for shipment from New York to Alabama and contained a clause which limited the carrier's liability to a maximum of $50. That provision was valid under the laws of the State of New York but invalid as against the public policy of the State of Alabama. This court held the validity of the clause was to be determined under Alabama law in light of the fact that performance of the contract, delivery of the goods, was to take place in Alabama.

The law of the State of New York, which favors arbitration, is not applicable to this case, because parties cannot stipulate to the application of the law of another jurisdiction where that law is against the public policy of Alabama.

VI.

We conclude that the trial court erred in holding that Alabama law and public policy do not apply in this case. For the reasons stated, the trial court should, forthwith, dissolve the stay granted on 21 June 1982 and allow Alabama Oxygen Company and the Bessemer Development Board to continue prosecution of CV 81-530 in state court. Failing to do so, then upon application of petitioners, the writ of mandamus will issue from this court to compel that action.

WRIT OF MANDAMUS ISSUED CONDITIONALLY.

Faulkner, Almon, Embry, Beatty and Adams, JJ., concur.
Jones and Shores, JJ., concur specially.
Torbert, C. J., and Maddox, J., dissent.

82-106 — *Ex parte Alabama Oxygen Company*

SHORES, JUSTICE (concurring specially):

I can find nothing to convince me that the Congress has preempted state law in this area. I am convinced to the contrary and find support for this position in the legislative history of the Federal Arbitration Act quoted by Justice Black in his opinion in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, supra, and, while his opinion was a dissenting one, his dissent was not on this point, and what he said on this point goes unchallenged by the Supreme Court through *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, supra, decided February 23, 1983. I quote Justice Black from *Prima Paint*:

> "[T]here are clear indications in the legislative history that the Act was not intended to make arbitration agreements enforceable in state courts [*]. . . .
>
> "[*] See, e.g., Cohen & Dayton, [The New Federal Arbitration Law, 12 Va. L. Rev. 265 (1926)] at 277; Committee on Commerce, Trade & Commercial Law, [The United States Arbitration Law and Its Application, 11 A.B.A.J. 153] at 155, 156. Mr. Rose, representing the Arbitration Society of America, suggested that the Act might have the beneficial effect of encouraging States to enact similar laws, Joint Hearings [on S. 1005 and H.R. 646 before the Subcommittee of the Committees on the Judiciary, 68th Cong., 1st Sess.], at 28, but Mr. Cohen assured Congress:
>
> " 'Nor can it be said that the Congress of the United States, directing its own courts * * *, would infringe upon the provinces or prerogatives of the States. * * * [The] question of the enforcement relates to the law of remedies and not to substantive law. The rule must be changed for the jurisdiction in which the agreement is sought to be enforced * * *. There is no disposition therefore by means of the Federal bludgeon to force an individual State into an unwilling submission to arbitration enforcement.' Id., at 39-40."

87 S. Ct. at 1814.

Jones, J., concurs.

MADDOX, JUSTICE (Dissenting).

I respectively dissent for the following reasons:

(1) The contract involved was one involving interstate commerce and contained an arbitration agreement voluntarily entered into by the parties.

(2) The Federal Arbitration Act (9 U.S.C. §2 (1976)) creates a federal right to specific enforcement of arbitration agreements which are a part of contracts involving interstate commerce, notwithstanding any state substantive or procedural policies to the contrary.

I

By its terms, the Federal Arbitration Act makes "valid, irrevocable, and enforceable" any written arbitration provision in a "maritime transaction or a contract evidencing a transaction involving commerce." 9 U.S.C. §2 (1976).[1]

The stay provision in 9 U.S.C. § 3[2] has been held to apply to the two kinds of contracts specified in §§ 1[3] and 2 of the Act.

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[1]Section 2 reads:

"A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, of any agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

[2]Section 3 reads:

"If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

[3]Section 1 reads:

" 'Maritime transactions', as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in

Bernhardt v. Polygraphic Co., 350 U.S. 198, 201, 76 S.Ct. 273, 275 (1956); *Prima Paint v. Flood and Conklin Mfg. Co.*, 388 U.S. 395, 401, 87 S.Ct. 1801, 1804 (1967). The contract in the case at bar providing for the sale of the refrigeration system is, as the trial court found, one involving interstate commerce, thus meeting the Act's test of applicability. The Act's legislative history reflects the apparent desire by Congress to enact a measure to quell longstanding judicial and legislative enmity to executory arbitration agreements. The Senate Judiciary Committee reported:

> "But it is very old law that the performance of a written agreement to arbitrate would not be enforced in equity, and that if an action at law were brought on the contract containing the agreement to arbitrate, such agreement could not be pleaded in bar of the action; nor would such an agreement be ground for a stay of proceedings until arbitration was had. Further, the agreement was subject to revocation by either of the parties at any time before the award. With this as the state of the law, such agreements were in large part ineffectual, and the party aggrieved by the refusal of the other party to carry out the arbitration agreement was without adequate remedy.
>
> "Until recently in England, and up to the present time in nearly, if not quite all, the States of the Union, such has been the law in regard to arbitration agreements. The Federal courts have in the main been governed by the same rules and, as a consequence, have denied relief to the parties seeking to compel the performance of executory agreements to settle and determine disputes by arbitration. If the agreement to arbitrate is found in a maritime contract or transaction, no action in admiralty for specific per-

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foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; 'commerce', as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."

formance will lie, for the simple reason that this court is without power to grant equitable relief.

"Various reasons have been given for these ancient rules of English law, followed as they have been by our State and Federal courts. Among these reasons were, first, the expressed fear on the part of the courts that arbitration tribunals did not possess the means to give full or proper redress, and also the doubt they entertained as to their right to compel an unwilling party to submit his cause to such a tribunal, thus, denying to him the right to submit the same to the ordinary courts of justice for hearing and determination. Second, the jealously of their rights as courts, coupled with the fear that if arbitration agreements were to prevail and be enforced, the courts would be ousted of much of their jurisdiction. To what extent the second reason influenced the first may be difficult to say; but it is not unreasonable to suppose that a desire to retain, if not extend, their jurisdiction had much to do with inspiring the fear that arbitration tribunals could not do justice between the parties. And third, established precedent has had its large part of course in perpetuating the old rules long after the courts themselves could no longer see that they were founded in reason or justice."

S. Rep. No. 536, 68th Cong., 1st Sess. 2-3 (1924).

The following portion of the House Judiciary Committee report on the arbitration bill is equally instructive:

"The matter is properly the subject of Federal action. Whether an agreement for arbitration shall be enforced or not is a question of procedure to be determined by the law court in which the proceeding is brought and not one of substantive law to be determined by the law of the forum in which the contract is made. Before such contracts could be enforced in the Federal courts, therefore, this law is essential. The bill declares that such agreements shall be recognized and enforced by the courts of the United States. The remedy is founded also upon the Federal control over interstate commerce and over admiralty. The control over interstate commerce reaches not only the actual physical interstate shipment of goods but also contracts relating to interstate commerce.

"Arbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting

> party live up to his agreement. He can no longer refuse to perform his contract when it becomes disadvantageous to him. An arbitration agreement is placed upon the same footing as other contracts, where it belongs."

H. R. Rep. No. 96, 68th Cong., 1st Sess. 1 (1924). As a consequence, the Act, which was enacted in 1925, creates a federal right to specific enforcement of arbitration agreements which are a part of contracts involving interstate commerce. *See* 9 U.S.C. §4[4] (1976); *see generally* Annot., 95 A.L.R. 3d 1145 (1979). I am of the opinion this includes the contract here.

The Supreme Court of the United States in *Moses H. Cone Mem. Hospital v. Mercury Const. Corp.*, [MS. 81-1203, Feb.

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[4]Section 4 reads:

"A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28 in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof."

23, 1983], ___ U.S. ___ (1983), discussed the applicability of arbitration clauses in contracts involving interstate commerce.

There, Mercury, whose principal place of business is in Alabama, and the hospital, which is located in North Carolina, entered into a contract for the construction of additions to the hospital building. The contract, drafted by representatives of the hospital, included a broad arbitration clause which provided that any dispute decided by the project architect in the first instance could be submitted by either party binding arbitration.

While there are several other issues which the Court addresses in the opinion relative to the particular facts of that controversy, the following language relates entirely to the issue before this Court in this case:

> "The basic issue presented in Mercury's federal suit was the arbitrability of the dispute between Mercury and the Hospital. *Federal law in the terms of the Arbitration Act governs that issue in either state or federal court.* Section 2 is the primary substantive provision of the Act, declaring that a written agreement to arbitrate 'in any maritime transaction or a contract evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.' 9 U.S.C. §2, *Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.* The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act. In *Prima Paint Corp. v. Flood & Conklin Mfg. Corp.*, 388 U.S. 395 (1967), for example, the parties had signed a contract containing an arbitration clause, but one party alleged that there had been fraud in the inducement of the entire contract (although the alleged fraud did not go to the arbitration clause in particular). The issue before us was whether the issue of fraud in the inducement was itself an arbitrable controversy. We held that the language and policies of the Act required the conclusion that the fraud issue was arbitrable. *Id.*, at 402-404. *Although our*

holding in Prima Paint extended only to the specific issue presented, the courts of appeals have since consistently concuded that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. We agree. The arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." (Footnotes omitted). (Emphasis supplied.)

Moses H. Cone Mem. Hospital, supra.

I am of the opinion that the Supreme Court of the United States has stated the applicable law concerning the enforceability of executory agreements to arbitrate. Moreover, the Supreme Court discussed the question of a state court's stay of a court action pending arbitration pursuant to §3 of the Arbitration Act, which is precisely what the circuit court did in the present case:

"Finally, in this case an important reason against allowing a stay is the probable inadequacy of the state-court proceeding to protect Mercury's rights. We are not to be understood to impeach the competence or procedures of the North Carolina courts. *Moreover, state courts, as much as federal courts, are obliged to grant stays of litigation under §3 of the Arbitration Act.* It is less clear, however, whether the same is true of an order to compel arbitration under §4 of the Act. We need not resolve that question here; it suffices to say that there was, at a minimum, substantial room for doubt that Mercury could obtain from the state court an order compelling the Hospital to arbitrate. In many cases, no doubt, a §3 stay is quite adequate to protect the right to arbitration. But in a case such as this, where the party opposing arbitration is the one from whom payment or performance is sought, a stay of litigation alone is not enough. It leaves the recalcitrant party free to sit and do nothing — neither to litigate nor to arbitrate. If the state court stayed litigation pending arbitration but declined to compel the Hospital to arbitrate, Mercury would have no sure way to proceed with its claims except to return to federal court to obtain a §4 order —

> a pointless and wasteful burden on the supposedly summary and speedy procedures prescribed by the Arbitration Act." (Emphasis added.)

Moses H. Cone Mem. Hospital, supra.

The majority states that the existence of a state policy against the specific enforcement of agreements to arbitrate future disputes renders this type of agreement unenforceable, citing *Wells v. Mobile County Board of Realtors,* 387 So. 2d 140 (1980), as authority.

Wells, supra, involved an arbitration clause in a contract involving intrastate commerce, not interstate commerce as is the case here. I would point out that the enforcement of arbitration clauses in any contract, whether involving intrastate or interstate commerce is not, in my opinion, clearly forbidden. In *Headley v. Aetna Ins. Co.,* 202 Ala. 385, 80 So. 466 (1918), which was cited in *Wells,* the following statement was made by the Court:

> "An arbitration clause, induced by fraud, folly, or undue pressure, might well be refused a specific performance, or disregarded, when set up as a defense; *but when parties stand upon equal footing, and provide such a mode for the adjustment of their differences, it is not easy to assign a reason why such contracts should not stand.*" (Emphasis added.)

202 Ala. at 385, 80 So. at 467.

The enforceability of such agreements in commercial contracts would seem to be permitted by current law and would not violate this state's public policy. On the public policy question, this Court has held:

> "The true test to determine whether a contract is unenforceable because of public policy is whether the public interest is injuriously affected in such substantial manner that private rights and interests should yield to those of the public."

***Colston v. Gulf States Paper Corp.,* 291 Ala. 423, 427, 282 So. 2d 251, 255 (1973).**

Since this Court has stated in the past that a promisor should be held strictly to the literal terms of his promise, *Alpine Const. Co. v. Water Works Board of the City of Birmingham*, 377 So. 2d 954 (1979), and it is clear that in this contract, which involves interstate commerce, the parties had the power to exclude the federal act by omitting any provision for arbitration, I see no reason why the provisions of the federal act should not be complied with, as the trial court held.

II

The holding of the Court expresses a minority view in this area of law. Many of the federal and state courts which have addressed this issue have held such arbitration agreements enforceable. In the leading case of *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F. 2d 402 (2d Cir. 1959), *cert. granted*, 362 U.S. 909, 80 S. Ct. 682, *cert. dismissed*, 364 U.S. 801, 81 S. Ct. 27 (1960), a direction was made to stay court proceeding pending arbitration pursuant to the Federal Arbitration Act. The following language of the opinion is instructive:

> "Thus we think the text of the Act and the legislative history demonstrate that the Congress based the Arbitration Act in part on its undisputed substantive powers over commerce and maritime matters. To be sure much of the Act is purely procedural in character and is intended to be applicable only in the federal courts. But Section 2 declaring that arbitration agreements affecting commerce or maritime affairs are 'valid, irrevocable, and enforceable' goes beyond this point and must mean that arbitration agreements of this character, previously held by state law to be invalid, revocable or unenforceable are now made 'valid, irrevocable, and enforceable.' This is a declaration of national law *equally applicable in state or federal courts*. . . . This conclusion flows directly from the realization by the Congress that nothing of significance would have been accomplished without tapping these substantive sources of power. It is these that put teeth into the statute and make it accomplish the salutary and beneficial ends the Congress had in mind. It matters not that in the in-

terval of years since the passage of the Act this point has only rarely been noticed. . . . What does matter is whether or not this reasoning is sound. And we believe it to be sound if the Congress intended to use to the fullest possible extent its powers to regulate commerce as it was affected by arbitration agreements and to do the same thing in the field of maritime law." (Emphasis added.)

271 F.2d at 407.

Other federal courts of appeals have similarly ruled that § 2 of the Act is pre-emptive of conflicting state laws which restrict the enforceability of arbitration agreements. *See* e.g., *American Airlines, Inc. v. Louisville & Jefferson County Air Board,* 269 F.2d 811, 815 (6th Cir. 1959); *Collins Radio Co. v. Ex-Cell-O Corp.,* 467 F. 2d 955, 998 (8th Cir. 1972); *Supak & Sons Manufacturing Co., Inc. v. Pervel Industries, Inc.,* 593 F. 2d 135, 137 (4th Cir. 1979). *See also Zell v. Jacoby-Bender, Inc.,* 542 F. 2d 34 (7th Cir. 1976). *Cf. Ross v. Twentieth Century-Fox Film Corp.,* 238 F. 2d 632 (9th Cir. 1956) (The Federal Arbitration Act applied since there was an interstate commerce transaction, but California law applied as to whether the contract included an enforceable agreement to arbitrate, or merely included language too informal to be deemed a binding arbitration provision).

The Fifth Circuit Court of Appeals, prior to its division and the creation of the new Eleventh Circuit Court of Appeals, also enforced agreements to arbitrate pursuant to the requirements of the federal act. In *Commercial Metals Co. v. Balfour, Gutherie, and Co., Ltd.,* 577 F. 2d 264 (5th Cir. 1978), the Circuit Court held:

"It must be emphasized that the question of whether or not a dispute arising out of a contract will be subject to the arbitration process is left solely to the agreement of the parties to the contract. If the contract does not so provide, then no federal law requires arbitration. If the agreement does provide for arbitration, then Section 2 of the Act removes the previous impediments to enforcement of the clause."

". . . .

> "It is clear that the state courts are entirely able, as well as required, to apply the United States Arbitration Act and compel arbitration pursuant to the Act if the statutory requisites are present. . . ."

577 F. 2d at 266 and 269, *See Southeastern Enameling Corp. v. General Bronze Corp.*, 434 F. 2d 330 (5th Cir. 1970); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hayden*, 637 F. 2d 391 (5th Cir. 1981). *See also Blount Brothers Corp. v. M. K. Steel, Inc.*, 524 F. Supp. 1037 (N.D. Ala. 1981).

The majority rule in other state jurisdictions is that the Federal Arbitration Act controls the enforceability of Arbitration clauses in contracts being litigated in state court. Annot., 95 A.L.R.3d 114 at 1158 (1979). State courts relying on the proposition that the Federal Arbitration Act is based on Congress's power to control interstate commerce and admiralty have uniformly held that the supremacy clause, U.S. Const. art VI, cl. 2, irrespective of state law, controls actions brought in state court to enforce voluntary arbitration agreements in contracts evidencing transactions in interstate commerce. The Supreme Court of the State of Tennessee recently ruled:

> ". . . The supremacy clause resolves any inconsistency between the two laws [state and federal] in favor of the federally created right and subordinates Tennessee state law to the supreme law of the land. We, therefore, hold that Tennessee courts must recognize and apply the Federal Arbitration Act to interstate commerce contracts."

Tennessee River Pulp & Paper Co. v. Eichleary Corp., 637 S. W. 2d 853, 858 (Tenn. 1982).

The federal act was applied by the Supreme Court of the State of Georgia in *West Point-Pepperell, Inc. v. Multi-Line Industries, Inc.*, 231 Ga. 329, 201 S.E. 2d 452 (1973). In reversing a judgment restraining the seller from further attempts to compel arbitration in New York, as required by the written agreement between the parties, the Georgia court stated that since the transaction involved commerce within the meaning of the Federal Arbitration Act, the state law and policy with

respect to arbitration must yield to paramount federal law. *West-Point Pepperell, supra,* 231 Ga. at 331, 201 S.E. 2d at 453.

The former Kentucky rule that executory arbitration agreements were unenforceable was held inapplicable in *Fite & Warmath Const. Co., Inc. v. MYS Corp.,* 559 S.W. 2d 729 (Ky. 1977). The Supreme Court of Kentucky, in staying a state court proceeding pending arbitration, ruled:

> ". . . We, therefore, hold that the provisions of the U. S. Arbitration Act of 1925 apply to actions brought in the courts of this state where the purpose of the action is to enforce voluntary arbitration agreements in contracts evidencing transactions in interstate commerce.
>
> ". . . .
>
> "The effect of our decision makes enforceable a contract to arbitrate a future dispute where applicable federal law so provides. We do not consider, however, that we are displacing a viable public policy of this state. . . . The device of arbitration has been specifically approved by our State Constitution since 1799. Our case law has stated that it is the policy to favor the settlement of disputes by means of arbitration. The legislature has adopted an arbitration statute, Chapter 417 of th eKentucky Revised Statutes. This Act empowers the parties to voluntarily submit an existing dispute to the process of arbitration. The spectre remains, however, of the applicability of the common-law rule which as a matter of judg-made law prohibits the enforceability of agreements to arbitrate future disputes based on the questionable justification that such agreements 'oust the courts of jurisdiction.' This rationale has not escaped without serious criticism. . . . ."
>
> ". . . .
>
> "We are not concerned here with an adhesion contract or one where the bargaining power of the parties is disparate. We deal rather with an agreement voluntarily entered into by sophisticated and knowledgeable businessmen concerning a financial transaction of considerable magnitude. In such situation, we find no real support for the proposition that one of the parties is free to repudiate his promise. We are convinced that the application of federal law in this instance does not displace a fundamental public policy of this state."

559 S.W. 2d at 734, 735. *Accord Rederi v. Dow Chemical Co.*, 25 N.Y. 576, 255 N.E. 2d 774 (1970) *cert. denied* 398 U. S. 939, 90 S. Ct. 1844 (1970); *Episcopal Housing Corp. v. Federal Insurance Co.*, 269 S.C. 631, 239 S.E. 2d 647 (1977); *Burke County Pub. Schools Br. of Ed. v. Shaver Partnership*, 303 N.C. 408, 279 S. E. 2d 816 (1981); *Mamlin v. Susan Thomas, Inc.*, 490 S. W. 2d 634 (Tex. Civ. App. 1973); *Pinkis v. Network Lineman Corp.* 9 Wash. App. 337, 512 P. 2d 751 (1973); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Melamed*, 405 So. 2d 790 (Fla. Dist. Ct. App. 1981); *State ex rel. St. Joseph Light & Power Co. v .Donelson*, 631 S. W. 2d 887 (Mo. Ct. App. 1982). *But see Pullman, Inc. v. Phoenix Steel Corp.*, 304 A. 2d 334 (Del. 1973).

I am mindful of the rights of litigants to their day in court, but I am equally mindful of the intent of Congress to uphold voluntary arbitration clauses in contracts suc has the one involved here. "Federal law in the terms of the Arbitration Act governs that issue in either state or federal court." *Moses H. Cone Mem. Hospital, supra.* The plurality, in refusing to follow this principle of law announced in *Moses H. Cone Mem. Hospital,* states that "there seems to have been no consideration whether there is a strong federal interest in favor of commercial arbitration over litigation in state courts," and "that both the federal interest in preserving state contract law in this area outweighs federal interest in favor of arbitration," misreads the *Moses H. Cone Mem. Hospital* case, in my opinion. In fact, by reaching the conclusion it does, the plurality places emphasis upon a statement made in Justice Black's dissent in *Prima Paint* that "there are clear indications in the legislative history that the Act was not intended to make arbitration agreements enforceable in state courts. . . ."

In the first place, Justice Black's views were expressed in a dessenting opinion, and in *Moses H. Cone Mem. Hospital, supra,* the Supreme Court stated that the refusal of the federal district court to proceed because a state court suit was pending, was plainly erroneous in view of Congress's clear intent, in the Arbitration Act, to move the parties to an arbitrable

dispute *"out of court and into arbitration as quickly and easily as possible"* (Emphasis added.) In *Moses H. Cone Mem. Hospital, supra,* the Supreme Court stated that ". . . *state courts,* as much as federal courts, are *obliged to grant stays of litigation under §3 of the Arbitration Act."* (Emphasis added.) [MS. 81-1203, Feb. 23, 1983], ... U.S. ..... (1983). In footnote 34, which follows this statement in the *Moses H. Cone Mem Hospital* opinion, the Supreme Court noted:

> "Although §3 refers ambiguously to a suit 'in any of the courts of the United States,' the state courts have almost unanimously recognized that the stay provision of §3 applies to suits in state as well as federal courts, requiring them to issue the same speedy relief when a dispute is referrable to arbitration. (The North Carolina Supreme Court has so held, although not until after the District Court ordered this stay. *Burke County Public Schools Board of Education v. Shaver Partnership,* 303 N.C. 408, 279 S.E. 2d 816 (1981).) *This is necessary to carry out Congress's intent to mandate enforcement of all covered arbitration agreements; Congress can hardly have meant that an agreement to arbitrate can be enforced against a party who attempts to litigate an arbitrable disputed in federal court, but not against one who sues on the same dispute in state court.* See also *Prima Paint,* 388 U.S. at 404." (Emphasis added.)

[MS. 81-1203, Feb. 23, 1983], ... U.S. ..... (1983).

In *Burke County Pub. Schools Bd. of Ed. v. Shaver Partnership,* 303 N.C. 408, 279 S.E. 2d 816 (1981), as noted by the United States Supreme Court in its opinion, the Supreme Court of North Carolina explained that the application of the Federal Arbitration Act by state courts furthers the congressional intent of making available to the business community the benefits of arbitration, which eases the burden of crowded court dockets, and promotes uniformity where parties have agreed to arbitrate, thus discouraging "forum shopping." 279 S. E. 2d at 824. The *Burke* case was favorably noted by the Supreme Court of the United States in *Moses H. Cone Mem. Hospital, supra.*

Even assuming state courts were not "obliged to grant stays of litigation under §3 of the Arbitration Act," as the Supreme Court states in *Moses H. Cone Mem. Hospital,* I believe this Court should follow the almost unanimous holdings by other state courts that the Federal Arbitration Act is applicable to the contract sued upon here. With the cases being filed at the various levels of our state's judicial system proliferating each year, arbitration is a means of helping to ameliorate the overcrowding of our courts and the costly expense of litigation. Not suprisingly, the Uniform Arbitration Act, which was introduced by the Conference of Commissioners on Uniform State Laws in 1955 and which parallels the Federal Arbitration Act many respects, has been adopted in whole or in part in forty jurisdictions,[5] as a means of easing the tremendous strain on their state courts.

In his concurrence in *Bernhardt v. Polygraphic Co.,* 350 U.S. 198, 205, 76 S. Ct. 273, 277 (1956), Justice Frankfurter auspiciously noted that "[l]aw does change with times and not merely through legislative reforms," 350 U.S. at 209, 76 S. Ct. at 279-280. Regarding the influence of legislative enactments from other jurisdictions, Justice Frankfurter, quoting from *National City Bank of New York v. Republic of China,* 348 U. S. 356, 360, 75 S. Ct. 423, 427 (1955), further noted that: "A steady legislative trend, presumably manifesting a strong social policy, properly makes demands on the judicial process." 350 U. S. at 211, 76 S. Ct. at 281. I am o fthe opinion that the Supreme Court in *Moses H. Cone Mem. Hospital* was clearly aware of the development of the law concerning state court enforcement of the Federal Arbitration Act and has clearly held that the Federal Arbitration Act controls the enforcement of arbitration clauses in contracts which fall within the scope of the federal act. I, therefore deny petitioners' request for a writ of mandamus and affirm the trial court's stay order pur-

[5]American Arbitration Association Annual Report of 1980. Only Alabama, Iowa, Kentucky, Mississippi, Montana, Nebraska, North Dakota, Tennessee, Vermont and West Virginia have not adopted this uniform act.

suant to 9 U.S.C. § 3, pending arbitration of the contract dispute in this case.

Torbert, C. J., concurs.

IN THE CIRCUIT COURT
JEFFERSON COUNTY, ALABAMA
BESSEMER DIVISION

ALABAMA OXYGEN COMPANY, INC., and THE INDUSTRIAL DEVELOPMENT BOARD OF THE CITY OF BESSEMER, ALABAMA, Plaintiffs,	)	
v.	)	CIVIL ACTION NO.
YORK INTERNATIONAL, YORK DIVISION, BORG-WARNER CORPORATION, et al., Defendants.	)	CV 81-530

ORDER

This cause is before the Court on the motion of defendant York International, York Division, Borg-Warner Corporation (hereinafter "York") to stay these proceedings pending arbitration of the dispute between the parties pursuant to an agreement to arbitrate entered into by plaintiffs and defendant in 1976. The parties have submitted briefs, with accompanying documents and affidavit, on the issues presented by York's motion. The Court heard oral argument on York's motion on May 21, 1982. Upon consideration the briefs, documents, affidavit and oral arguments of the parties, the Court is of the opinion that York's motion to stay should be granted.

The Court finds that the Federal Arbitration Act applies to the contract at issue in this cause. The instant suit arises out of the sale of refrigeration equipment by York to the Industrial Development Board of the City of Bessemer, Alabama (hereinafter "Bessemer IDB"). The Bessemer IDB and the lessee of the equipment, Alabama Oxygen Company, Inc. (hereinafter "AOC"), claim that this equipment is not satisfactory. They have brought suit against York in this court.

The contract between the Bessemer IDB and York contains a broad arbitration clause providing for the final resolution of any disputes arising out of the contract between the parties. The pleadings and the affidavit of a York employee, John S. Mann, establish that the transaction governed by the contract between York and the Bessemer IDB was one involving interstate commerce. Plaintiffs do not challenge this conclusion. The Court finds, therefore, that the contract between the Bessemer IDB and York evidences "a transaction involving commerce" as that term is defined by Section 1 of the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* The Court further finds that because this suit arises out of a contract involving interstate commerce it is governed by the Federal Arbitration Act and that under the terms of that Act, the Court must stay these proceedings pending arbitration as required by 9 U.S.C. § 3. See, *e.g., Burke County Public Schools Board of Education v. Shaver Partnership,* 279 S.E.2d 816 (N.C. 1981); *Fite and Warmath Construction Company, Inc. v. MYS Corporation,* 559 S.W.2d 729 (Ky. 1977); *Episcopal Housing Corp. v. Federal Insurance Co.,* 239 S.E.2d 647 (S.C. 1977); *West Point-Pepperell, Inc. v. Multi-Line Industries, Inc.,* 231 Ga. 329, 201 S.E.2d 452 (1973); *Merrill Lynch Pierce Fenner & Smith Inc. v. Melamed,* 405 So. 2d 790 (Fla. Ct. of App. 4th *Dist.,* 1981).

As an alternative basis for granting York's motion to stay, the Court finds that even if state law rather than federal law governs the issues raised by York's motion, then the law of the State of New York — not Alabama — applies, and that under the law of New York agreements to arbitrate such as the one entered into by the Bessemer IDB and York are clearly enforceable. New York CPLR § 7501. The contract between the Bessemer IDB and York provides in the most unambiguous terms that the contract between these parties "shall be construed and governed by and according to the laws of the State of New York." Clauses such as this stipulating that the laws of another state will govern in the case of any dispute under the contract are enforceable in Alabama. ***Blalock v. Perfect Sub-***

scription Co., 458 F.Supp. 123 (S.D. Ala. 1978), aff'd 599 F.2d 743.

Plaintiff in responsive pleadings questioned the right of Lotepro Corporation to act as "agent" for the Bessemer IDB in entering into the contract with York, but produced no affidavit or other evidence to support that contention. The contract in question, which was before the Court, clearly reflects that Lotepro was the "agent" for the Bessemer IDB, and the Court therefore finds that Lotepro Corporation, as "agent" for the Bessemer IDB, had authority to and did enter into a binding contract, including the agreement to arbitrate, on behalf of the Bessemer IDB.

The Court further finds that the claims of AOC are based on or arise out of the agreement between the Bessemer IDB and York, that AOC is a third party beneficiary of the agreement between the Bessemer IDB and York, and that as a third party beneficiary AOC is bound by the agreement to arbitrate found in the contract between the IDB and York. Thus, ADC's claims are to be resolved by arbitration. *McBro Planning & Development Company and McCarthy Brothers Co. v. Harrington Construction Co., C.A. 80-325-N (M.D. Al. Oct. 7, 1980); Williston on Contracts,* Section 364A at n. 19 (3d ed. 1959).

The Court also finds that all of the claims raised by plaintiffs are subject to the agreement to arbitrate, or alternatively, that the question of whether any particular claim is subject to the agreement to arbitrate is initially one for decision by the arbitration panel. In any event, the Court finds that in the interest of judicial economy and to avoid possible duplicative proceedings, this case should be stayed until the conclusion of the arbitration proceedings.

For all of the above reasons, the Court concludes that defendant York's motion to stay should be granted. It is, therefore,

ORDERED that York's motion to stay pending arbitration

between the parties, filed herein on February 3, 1982, be and the same is hereby granted.

DONE this the 21st day of June, 1982.

/s/ WALTER G. BRIDGES
CIRCUIT JUDGE

Federal Arbitration Act, 9 U.S.C. §§1-13

§ 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, of an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§ 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in

which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28 [28 USCS], in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure [USCS Rules of Civil Procedure]. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of

the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure [USCS Rules of Civil Procedure], or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

§ 5. Appointment of arbitrators or umpire

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

§ 6. Application heard as motion

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

§ 7. Witnesses before arbitrators; fees; compelling attendance

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

§ 8. Proceedings begun by libel in admiralty and seizure of vessel or property

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

§ 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

§ 10. Same, vacation; grounds; rehearing

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause

shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

§ 11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

§ 12. Notice of motions to vacate or modify; service; stay of proceedings

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was

made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

§ 13. Papers filed with order on motions; judgment; docketing; force and effect; enforcement

The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

Ala. Const. of 1901, art. I, §13

Sec. 13. Courts to be open; remedies for all injuries; impartiality of justice.

That all courts shall be open; and that every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay.

Ala. Const. of 1901, art. IV, §84

Sec. 84. Adoption of laws to provide for arbitration between parties.

It shall be the duty of the legislature to pass such laws as may be necessary and proper to decide differences by arbitrators to be appointed by the parties who may choose that mode of adjustment.

Ala. Code §8-1-41 (1975)

§ 8-1-41. Obligations which cannot be specifically enforced.

The following obligations cannot be specifically enforced:

(1) An obligation to render personal service;

(2) An obligation to employ another in personal service;

(3) An agreement to submit a controversy to arbitration;

(4) An agreement to perform an act which the party has not power lawfully to perform when required to do so;

(5) An agreement to procure the act or consent of the wife of the contracting party or of any other third persons; or

(6) An agreement, the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable.

Office-Supreme Court, U.S.
FILED
SEP 1 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-165

In The

Supreme Court of the United States

October Term, 1983

YORK INTERNATIONAL and YORK DIVISION, BORG-WARNER CORPORATION,

Appellants,

vs.

ALABAMA OXYGEN COMPANY, INC. and THE INDUSTRIAL DEVELOPMENT BOARD OF THE CITY OF BESSEMER, ALABAMA,

Appellees.

On Appeal from the Supreme Court of Alabama

MOTION TO DISMISS

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PARENT COMPANIES AND AFFILIATES

As of the date of this filing, Alabama Oxygen Company, Inc., is a wholly-owned subsidiary of Tennessee Natural Resources, Inc. TNGL Reorg. Corp. is also a wholly-owned subsidiary of Tennessee Natural Resources, Inc. Tennessee Natural Resources, Inc., is a wholly-owned subsidiary of Tennessee Natural Gas Lines, Inc. Nashville Gas Company and Tennessee Oxygen Company, Inc., are also wholly-owned subsidiaries of Tennessee Natural Gas Lines, Inc.

No. 83-165

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ALABAMA OXYGEN COMPANY, INC. and THE INDUSTRIAL DEVELOPMENT BOARD OF THE CITY OF BESSEMER, ALABAMA,

Appellees.

On Appeal from the Supreme Court of Alabama

MOTION TO DISMISS

Appellees move the Court to dismiss this appeal on the grounds that the appeal is not within this Court's jurisdiction and does not present a properly raised substantial federal question expressly passed on by the Court below. Sup. Ct. R. 16.1 (a), (b), and (d).

ARGUMENT

A. This Appeal Is Not Within The Jurisdiction Of The Court As Conferred By 28 U.S.C. § 1257 (1) And (2).

Appellees move to dismiss this appeal on the ground that the appeal is from a decision of the Alabama Supreme Court which is not a final judgment, which does not declare invalid a statute of the United States, and which does not declare valid a state statute in face of a challenge on federal grounds.

The basis for this motion to dismiss is more easily explained in the context of an accurate representation of the decision from which this appeal is taken.[1] As shown below, Appellants mischaracterize the decision below in an effort to invoke the appellate jurisdiction of this Court.

The controlling issue addressed by the Court was one of choice of law:

> The dispositive issue presented for decision by this Court is whether the trial court erred in choosing to apply federal rather than state law and, in the alternative, New York rather than Alabama law.
>
> 17 A.B.R. at 2035 (A-4).

Only the Court's decision with respect to the choice between federal and state law is challenged on this appeal. To this issue the Court held as follows:

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[1]The decision below will be reported at 433 So. 2d 1158. As of the filing of this Motion Counsel for Appellees had not received this volume of the Southern Reporter advance sheets. For this reason citations to the opinion will be to the opinion as it appeared at 17 A.B.R. 2036 and in the Appendix to Appellants' Jurisdictional Statement; to-wit, 17 A.B.R. — (A—).

> We conclude that the trial court erred in holding that Alabama law and public policy do not apply in this case.
>
> 17 A.B.R. at 2050 (A-17).

Careful analysis of the Court's decision shows clearly that the basis of its decision was its interpretation of the intent of Congress in passing the Federal Arbitration Act,[2] and not the validity or invalidity of any federal or state statute. The question was not whether the Act of Congress was valid or invalid, but rather to what the Act was intended to apply:

> Our first inquiry is whether Congress . . . has prohibited state regulation of the aspect of commerce involved here.
>
> 17 A.B.R. at 2036 (A-5).

The Court concluded that Congress has not prohibited the questioned state action:

> The wording of the Act and its legislative history indicate a desire by Congress to create a law only applicable in federal courts in diversity cases.
>
> 17 A.B.R. at 2037 (A-6).

This is the holding of the court below. The Federal Arbitration Act is not held to be invalid, but rather is correctly interpreted, through its language and its history, not to extend to prohibit regulation of arbitration by a state.

It is true that the decision from which this appeal arises discusses the authority of Congress to so regulate

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[2] 9 U.S.C. § 1, *et seq.*

the state under the Commerce Clause[3] and the Tenth Amendment[4] to the United States Constitution. This discussion, however, is dictum, and is plainly presented as such. Part IV of the opinion is the portion in which the court's holding is explained. 17 A.B.R. at 2035-2049. The introduction to Part IV, 17 A.B.R. at 2035-2036, specifies that the court's interpretation of the Arbitration Act, as discussed above, is the basis of its holding, and that its discussion of the issues raised by the Commerce Clause and the Tenth Amendment are discussions of a hypothesis found not to exist:

> A review of the Act and its legislative history leads us to the conclusion that we would be remiss in interpreting it as applicable in Alabama. We believe the Supreme Court, upon full consideration of the issues, would not so hold. Further, we are of the opinion the Act, if construed as applicable to the states, presents serious constitutional questions.
>
> 17 A.B.R. at 2036 (A-5).

This point is more clearly evidenced by the conclusion of Part IV(A) of the opinion and the introductory sentence of Part IV(B) which immediately follows:

> We cannot, in light of the substance of the Act and its legislative history, conclude that Congress has, either explicitly or implicitly, ordained that the Federal Act preempt state law.
>
> B.
>
> Had the F.A.A. ordained that state law was to be preempted by the Act, we would be compelled to

---

[3]U.S. Const. art. I, § 8, cl. 3.

[4]U.S. Const. amend. X.

consider its constitutionality in light of the Commerce Clause and the Tenth Amendment.

17 A.B.R. at 2039 (A-8).

That the interpretation of the Act was the Court's holding, and that the discussion of the Commerce Clause and the Tenth Amendment was mere dictum is further evidenced by the concurring and dissenting opinions below. The *sole* issue addressed in the concurrence of Justice Shores, in which Justice Jones joins, is that of interpretation of the Act:

> I can find nothing to convince me that the Congress has preempted state law in this area. I am convinced to the contrary and find support for this position in the legislative history of the Federal Arbitration Act quoted by Justice Black in his opinion in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, [388 U.S. 395 (1967)], and, while his opinion was a dissenting one, his dissent was not on this point, and what he said on this point goes unchallenged by the Supreme Court through *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, supra, [103 S. Ct. 927 (1983)], decided February 23, 1983. I quote Justice Black from *Prima Paint:*
>
> > "[T]here are clear indications in the legislative history that the Act was not intended to make arbitration agreements enforceable in state courts [*] . . . .
> >
> > "[*] See, e.g., Cohen & Dayton, [The New Federal Arbitration Law, 12 Va. L. Rev. 265 (1926)] at 277; Committee on Commerce, Trade & Commercial Law, [The United States Arbitration Law and Its Application, 11 A.B.A.J. 153] at 155, 156. Mr. Rose, representing the Arbitration Society of America, suggested that the Act might have the beneficial effect of encouraging States

> to enact similar laws, Joint Hearings [on S. 1005 and H.R. 646 before the Subcommittees of the Committees on the Judiciary, 68th Cong., 1st Sess.], at 28, but Mr. Cohen assured Congress:
>
> "'Nor can it be said that the Congress of the United States, directing its own courts * * *, would infringe upon the provinces or prerogatives of the States. * * * [The] question of the enforcement relates to the law of remedies and not to substantive law. The rule must be changed for the jurisdiction in which the agreement is sought to be enforced * * *. There is no disposition therefore by means of the Federal bludgeon to force an individual State into an unwilling submission to arbitration enforcement.' Id., at 39-40."

87 S. Ct. at 1814.

17 A.B.R. at 2052 (A-18).

Similarly, the *sole* issue addressed in the dissent of Justice Maddox, in which Chief Justice Torbert joins, is the interpretation of the Act. 17 A.B.R. at 2053-2066. Neither of these opinions addresses the majority's dictum relating to the Commerce Clause and the Tenth Amendment.

As is apparent from this analysis of the opinion below, Appellants have mischaracterized the court's decision. The court does not hold "the Federal Arbitration Act, as applied to suits in state courts, unconstitutional", as is repeatedly suggested in the Jurisdictional Statement. Jurisdictional Statement, pp. 1-2, 6-11. The court simply held that the Act, by its terms and intent, did not apply to this situation.

The basis for this Motion to Dismiss becomes apparent when the holding below is correctly characterized. This appeal falls within neither 28 U.S.C. § 1257 (1) nor

(2). The Supreme Court of Alabama has not decided against the validity of the Federal Arbitration Act, so § 1257 (1) is inapplicable. The Act is valid; the Court simply holds that, by its terms and by the intent of its authors, it does not extend to prohibit application of state-law public policy considerations. Additionally, no state statute has been questioned as being repugnant to any law of the United States, so § 1257 (2) is inapplicable. Although the action taken by the Court below was in conformity with an Alabama statute, that statute was not challenged by Appellants.[5] The Court below dealt with the interpretation of the Federal Arbitration Act, not the validity of any Alabama statute.

A further ground for dismissal arises from the fact that the decision below is not a "final judgment" within the meaning of 28 U.S.C. § 1257. Appellants make the blanket assertion that the issue of the applicability of the Federal Arbitration Act to these facts has been finally determined and "is not subject to further review in the courts of Alabama". Jurisdictional Statement, p. 2. This is inaccurate.

This appeal is from a conditional grant of a Petition for Writ of Mandamus. The trial court subsequently dissolved the stay it had previously entered. Entry of the stay was not an appealable order under Alabama law, *Baltman v. Palm Oil & Supply Co.*, 88 So. 30 (Ala. App. 1920), nor would denial of the stay have been appealable. The action of the trial court in entering, denying, or dis-

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[5]The statute involved is merely reflective of the common law public policy of the State of Alabama, *Wells v. Mobile County Bd. of Realtors*, 387 So. 2d 140 (Ala. 1980), and was discussed by the Court below only in that context.

solving a stay would be reviewable by appeal upon entry of a final order in the case. In this instance, Appellants have the right to appeal the trial court's dissolution of the stay at the conclusion of this case.

Not only do Appellants have the right to appeal this issue to the Supreme Court of Alabama, the fact that the Supreme Court has previously ruled on the issue in the same case does not prejudice Appellants in any subsequent appeal. Through a statute apparently unique to Alabama, the "law of the case" has been abrogated and the Supreme Court is compelled to consider any subsequent appeal "without regard to such former ruling on the law by it." *Code of Alabama* § 12-2-13 (1975). Should the Court determine in a subsequent appeal that its ruling in this case was in error, it would be compelled to overrule this decision. *Elmore County v. Tallapoosa County*, 222 Ala. 147, 131 So. 552 (1930); *Booker v. Booker*, 225 Ala. 626, 144 So. 870 (1932). Clearly the issues raised by Appellants in opposition to Appellees' Petition to the Supreme Court of Alabama is subject to further review by that Court through appeal at the conclusion of the case.

Although Appellants cite cases which evidence an expanded "penumbral area" in the concept of finality, they are unable to cite any case which holds that this appeal is from a judgment that is final within the meaning of 28 U.S.C. § 1257.

B. This Appeal Does Not Present A Properly Raised Substantial Federal Question Expressly Passed On By The Court Below.

The true issue upon which Appellants seek review is whether the Federal Arbitration Act is intended to apply

to state courts, for it was the Alabama Supreme Court's holding on this issue which resulted in a ruling adverse to Appellants' position. The issue, however, cannot be so simply stated for purposes of making an appeal to this Court, for such an issue falls without this Court's jurisdiction. The issue of construction of federal law, as opposed to the constitutionality of that law, provides no basis for appeal to this Court. *Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. 275, 290 (1958).[6] Appellants have found it necessary, therefore, to assert other issues in an attempt to bring the case within permissible grounds for appeal:

> 1. Is this Court's holding in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.* [103 S. Ct. 927 (1983)] that state courts are obligated to follow and apply the Federal Arbitration Act mere "dicta" which a state court is free to ignore if it concludes that the Federal Arbitration Act is repugnant to state law regarding arbitration?
>
> 2. Does Congress have the authority under the Commerce Clause to make the Federal Arbitration Act Applicable to a state court suit in which the plaintiffs' claim is based on a contract admittedly involving a transaction in interstate commerce?

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[6]Although the Court in *Ivanhoe* found no basis for an appeal, certiorari was granted. In their Jurisdictional Statement, p. 2, n. 3, Appellants suggest that their appeal be deemed a Petition for Certiorari should an appeal be inappropriate. No grounds are cited, nor is any argument made, however, which would support a grant of certiorari in this case. Appellants make no attempt to set out the considerations which might support a grant of certiorari, as required by Sup. Ct. R. 17.1. To the contrary, as discussed *infra*, Appellants mischaracterize the opinion below and structure the issues upon which they seek consideration in an obvious and strained effort to fall within the appellate jurisdiction provided in 28 U.S.C. § 1257 (1) and (2). Our discussion, *infra*, of the issues of finality and lack of a substantial federal question indicates that a grant of certiorari is not warranted in this case.

> 3. Does the Federal Arbitration Act, as applied to suits in state courts, violate the Tenth Amendment to the United States Constitution?
>
> Jurisdictional Statement, p. i.

That the second and third of these questions do not warrant consideration is most easily addressed. These issues simply are not presented by this appeal.[7] As discussed above, pp. 2-7, these issues were addressed by the Supreme Court of Alabama only in the context of a hypothesis found not to exist. Although the Court made clear its view on these issues in the abstract, its view did not constitute the holding in this case.

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues.
>
> *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955).

The basis for the Court's decision was independent of either of the second or third issues. Were this Court to find that the Commerce Clause and the Tenth Amendment permitted Congress to regulate state action regarding arbitration, such a finding would not alter the holding of the court below: that Congress, in fact, did not so regu-

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[7]The Jurisdictional Statement does not comply with Sup. Ct. R. 15.1 (g) in that it does not, and indeed cannot (since they were not raised), state when these issues were raised below, how they were raised, and how they were resolved. At best, Appellants' argument below was that federal rights prevented application of a state statute. This argument is insufficient to support an appeal. *Mergenthaler Linotype Co. v. Davis*, 251 U.S. 256 (1920).

late. What better argument that an issue is unsubstantial could be made than that resolution of the issue would not alter the ruling from which an appeal is sought.

The first question raised by Appellants, whether certain language in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 103 S. Ct. 927 (1983), is holding or dictum is similarly unsubstantial.[8] Not only is the questioned language dictum, but the case is inapposite to that on appeal. In *Moses H. Cone, supra,* this Court was asked to review the reversal of a decision of a United States District Court by a United States Circuit Court of Appeals. 103 S. Ct. at 933. No action of any state court was before this court for review. At issue was the decision of the federal District Court to stay an action due to the pendency of parallel litigation in a state court. 103 S. Ct. at 935-6. No state court was being asked to apply the Federal Arbitration Act. Had that issue been raised, which it was not, the relevant state law to be considered was totally opposite that of Alabama in that it presented no public policy against agreements to arbitrate future disputes. 103 S. Ct. at 943, n. 36. The decision in *Moses H. Cone, supra,* is distinguishable from the instant appeal in all respects-factual, procedural, and substantive.

For more than 140 years the public policy of the State of Alabama has looked with strong disfavor on agreements to arbitrate future disputes. *Bozeman v. Gilbert,* 1 Ala. 90 (1840). The Constitution of Alabama guarantees to the citizens of Alabama the right to seek redress in the

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[8]The issue is one of *construction* of federal law, not its *constitutionality,* and thereby provides no basis for appeal. *Ivanhoe Irrig. Dist. v. McCracken,* 357 U.S. 275, 290 (1958).

Courts of the state for any wrong suffered. *Alabama Constitution* § 13 (1901). The public policy here at issue preserves that right. Perhaps Alabama stands alone, or in a minority, in providing its citizens with this guarantee —that its courts shall always be open to them when they are wronged.[9] If this is true, the decision on appeal will have a minimal effect throughout our country. Such being the case, enforcement of these rights should be left to the local courts charged with their preservation. The plenary review of this Court should be reserved for those cases of national import.

The final ground supporting the proposition that the appeal presents no substantial federal question is that the issue decided by the Court below was correctly decided. It is in conflict with no decision of this Court or any other state court of last resort or federal court of appeals. The language of the Act and its legislative history evidence clearly that § 3 of the Act is limited in its application to the federal courts and not be forced on an unwilling state court having inconsistent public policy. Perhaps it was hoped that the Act would "have the beneficial effect of encouraging States to enact similar laws", but it was

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[9]Appellants do not suggest that the public policy of Alabama which was at issue in this case is present in any other jurisdiction. Justice Maddox in his dissent, below, 17 A.B.R. at 2053-2066 (A-19-33), suggests that almost all states have a public policy consistent with the Federal Arbitration Act, not opposed to it. He notes that all but a few states have adopted the Uniform Arbitration Act. 17 A.B.R. at 2065-6 (A-32). The decision of the Alabama Supreme Court in this case is not in conflict with the decision of any other state or federal courts which do not face the public policy consideration present in Alabama.

clearly not intended to "infringe upon the provinces or prerogatives of the States."[10]

CONCLUSION

For the reasons stated above, this appeal should be dismissed.

Respectfully submitted,

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[10] *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), Mr. Justice Black, dissenting, 87 S. Ct. at 1814, quoting the Joint Hearings on S. 1005 and H. R. 646 before Subcommittees of the Committees on the Judiciary 68th Cong., 1st Session.

Office-Supreme Court, U.S.
FILED
SEP 13 1983
ALEXANDER L. STEVAS,
CLERK

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v.

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and THE INDUSTRIAL DEVELOPMENT BOARD
OF THE CITY OF BESSEMER, ALABAMA,
Appellees.

ON APPEAL FROM THE SUPREME COURT
OF ALABAMA

APPELLANTS' REPLY MEMORANDUM

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APPELLANTS' REPLY MEMORANDUM

Appellants respectfully submit this Reply Memorandum to Appellees' Motion to Dismiss.

Appellees contend in their Motion to Dismiss that an appeal is inappropriate because no federal statute has been found unconstitutional. Appellees argue that the Alabama Supreme Court's extensive analysis and holdings regarding the constitutionality of the Federal Arbitration Act were mere dicta not to be considered by this Court in deciding whether to take an appeal of this case. However, to reach this conclusion Appellees must (as did the Alabama court)

ignore this Court's holdings in *Moses Cone*.[1] The Alabama court held that if the Federal Arbitration Act preempts state law then that Act is unconstitutional. 433 So.2d at 1162-63. Since this Court in *Moses Cone* clearly stated that the Federal Arbitration Act preempts state law,[2] unless one is willing to ignore *Moses Cone* the Alabama court has in fact held that the Federal Arbitration Act is unconstitutional.[3]

Appellees compound their error by asserting that no substantial federal question has been raised and then by stating at page 12 of their Motion:

> "It [the decision of the Alabama Supreme Court] is in conflict with no decision of this court or any state court of last resort or federal court of appeals."

Appellees' statement is simply wrong. This Court in *Moses Cone* and the highest courts of several states have held that when an agreement to arbitrate is set forth in a contract evidencing a transaction affecting commerce, Section 3 of the Federal Arbitration Act governs a motion to stay pending arbitration *regardless* of any state policy to the contrary.[4] Decisions of the federal courts of appeals are in

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[1]103 S. Ct. 927 (1983).

[2]This Court held that the Federal Arbitration Act "is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary" (*Id.* at 941); that "federal law in the terms of the Arbitration Act governs [the] issue [of arbitrability] in either state of federal court" (*Id.* at 941); and that "state courts, as much as federal courts, are obligated to grant stays of litigation under § 3 of the Arbitration Act." *Id* at 942.

[3]Appellees' reliance on *Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. 275 (1958) is misplaced. In *Ivanhoe*, the California Supreme Court decided a point of federal law that had not been previously addressed by this Court. In the instant case, the Alabama Supreme Court ignored prior, express holdings by this Court in *Moses Cone*.

[4]"The supremacy clause resolves any inconsistency between the two laws [state and federal] in favor of the federally created right and subordinates Tennessee state law to the supreme law of the land. We, therefore, hold that the Tennessee courts must recognize and apply the

accord.[5] Thus, while appellants are convinced that an appeal is proper, certiorari is also proper.[6]

Appellees assert that the decision of the Alabama Supreme Court is not a final order because Alabama does not recognize the traditional "law of the case" doctrine. However, the statute relied on by the Appellees provides nothing more than a second opportunity for a rehearing before the Supreme Court of Alabama.[7] The rules and decisions of this Court do not require a party to seek a rehearing before proceeding with an appeal. See, *e.g.*, *Market Street Rail Co. v. Railroad Comm. of Calif.*, 324 U.S. 548, 551-52 (1944). Similarly, in the instant case, the fact that an opportunity exists for a second rehearing does not affect the appealability of the order entered by the Alabama Supreme Court.[8]

Federal Arbitration Act to interstate commerce contracts." *Tennessee River Pulp & Paper Co. v. Eichleay Corp.*, 637 S.W.2d 853, 858 (Tenn. 1982). See, also, *West Point-Pepperell, Inc. v. Multi-Line Industries, Inc.*, 201 S.E.2d 453 (Ga. 1973); *Fite & Warmath Const. Co., Inc., v. MYS Corp.*, 559 S.W.2d 729 (Ky. 1977); *Burke County Pub. Schools Bd. of Ed. v. Shaver Partnership*, 279 S.E. 816 (N.C. 1981); *Episcopal Housing Corp. v. Federal Ins. Co.*, 239 S.E.2d 647 (S.C. 1977).

[5]See, *e.g.*, *Commercial Metals Co. v. Balfour, Guthrie & Co.*, 577 F.2d 264, 289 (5th Cir. 1978) ("It is clear that the state courts are entirely able, *as well as required*, to apply the [Federal] Arbitration Act and compel arbitration pursuant to the Act if the statutory requisites are present." [emphasis added]).

[6]Sup. Ct. R. 17(b).

[7]*Code of Alabama* § 12-2-13 (1975). The Alabama Supreme Court has acknowledged the reality of the situation. Dealing with the very statute cited by Appellees that court has stated: "This is the second appeal in this case, and the decree from which this appeal was taken conformed to the opinion of the court. . . . This appeal, therefore, involves the soundness of said opinion, *and is in the nature of a second application for rehearing.*" *Bank of Luverne v. Reddoch*, 211 Ala. 699, 100 So. 922 (1924) (emphasis added).

[8]This is particularly true where the order in question has been considered by all nine justices of the Alabama Supreme Court and there were lengthy majority concurring and dissenting opinions.

The issues raised by Appellants are obviously substantial. The Alabama court made definitive rulings on the only federal issue involved in the case – does the Federal Arbitration Act apply to suits involving interstate commerce pending in state courts? The Alabama court first ignored the explicit holdings of this Court in *Moses Cone* and then held that if this Court meant what it clearly said in *Moses Cone,* the Federal Arbitration Act so interpreted was unconstitutional. Under these circumstances, action by this Court is both necessary and proper.

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